THE STRUCTURE OF OVERSEAS CIVILIAN EMPLOYMENT

FOR DOD CIVIL SERVANTS

&

HOST NATIONAL EMPLOYEES

IN EUROPE

INCLUDING PAY & ALLOWANCES

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ABBREVIATIONS

ADCON	Administrative Control
AF	Appropriated Fund
BRAC	Base Realignment and Closure
C.F.R.	U.S. Code of Federal Regulations
COLA	Cost of Living Allowance
COMNAVEUR-COMSIXTHFLEET	Commander, U.S. Navy Europe - Commander, Sixth Fleet (also CNE-C6F)
CONUS	Continental United States (does not include Alaska or Hawaii)
CPM	DOD Civilian Personnel Manual DOD 1400.25-M (USD(P&R) December1996)
DASN (CP/EEO)	Deputy Assistant Secretary of the Navy (Civilian Personnel/Equal Opportunity)
DSSR	Dept of State Standardized Regulations
Comp. Gen.	Comptroller General
Dir	Directive
DN	Dual National
DON	Department of the Navy
DOS	Department of State
EUCOM	U.S. European Command
FPM	Federal Personnel Manual
F-OCONUS	Foreign location Outside the Continental United States

FTA	Foreign Transfer Allowance (expenses upon leaving the United States)
FTR	Federal Travel Regulation, located in the C.F.R.
GAO	Government Accounting Office
GSBCA	General Services Administration Board of Contract Appeals
HHG	Household Goods
IAW	In accordance with
INST	Instruction
JTR	Joint Travel Regulation
LQA	Living Quarters Allowance
MAJCOM	Major Command
NAF	Nonappropriated Fund
NAF Personnel Manual	BUPERSINST 5300.10A, Subj: Bureau of Naval Personnel Nonappropriated Fund (NAF) Personnel Manual For Navy Nonappropriated Fund Instrumentalities (NAFIS) (BUPERS-653 27 May 2003)
NAVEUR	U.S. Naval Forces Europe (also COMNAVEUR)
NAVSUP	Naval Supply Command
NF-OCONUS	Non-Foreign location Outside the Continental United States, i.e., Alaska, Hawaii and U.S. possessions such as Puerto Rico
OCONUS	Outside the Continental United States. Generally means outside the United States overseas, but technically includes Alaska and Hawaii.
OCPM	(Navy) Office of Civilian Personnel Management
OR	Ordinarily Resident

PA	Post Allowance
PCS	Permanent Change of Station
PDS	Permanent Duty Station
POC	Personally Owned Conveyance
POV	Privately Owned Vehicle, e.g., an employee's car
PPP	DOD Priority Placement Program
RAT	Renewal Agreement Travel
SC	Subchapter
SECDEF	Secretary of Defense
TA	Transportation Agreement
TAD	Temporary Additional Duty away from Post
TDY	Temporary Duty away from Post
TOF	Transfer of Function
TQSA	Temporary Quarters Subsistence Allowance (upon arrival at & departure from a foreign area)
TQSE	Temporary Quarters Subsistence Expense (upon return to the United States)
USAEUR	United States Army - Europe
USAFE	United States Air Force - Europe
U.S.C.	United States Code

WEB SITES

DOD Instructions & Manuals	http://www.dtic.mil/whs/directives/
DSSR	http://www.state.gov/m/a/als - Standardized Regulations (DSSR)
JTR	https://secureapp2.hqda.pentagon.mil/perdiem/ - Travel Regulations
Passport Info	https://secureapp2.hqda.pentagon.mil/passportmatters/
NAF Personnel Manual	http://www.mwr.navy.mil/mwrprgms/bupers5300_10a.pdf
DOD PPP Operations Manual	http://dayton.cpms.osd.mil/public/manindex.cfm

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THE STRUCTURE OF OVERSEAS CIVILIAN EMPLOYMENT FOR DOD CIVIL SERVANTS & HOST NATIONAL EMPLOYEES IN EUROPE INCLUDING PAY & ALLOWANCES

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Warning: This outline is **NOT** the answer to civilian personnel issues. It is the context in which you ought to be discussing personnel issues with Human Resources Office or the Transportation Office.

I. INTRODUCTION.

This outline describes the legal framework for the Department of Defense and the Department of the Navy overseas civilian personnel programs - primarily in European countries bordering the Mediterranean. For a discussion of overseas personnel issues in Germany, see Litak, Mike "U.S. and Them: Citizenship Issues in Department of Defense Civilian Employment Overseas," *The Army Lawyer* (June 2005).

II. BACKGROUND ON EMPLOYMENT OF HOST NATIONAL EMPLOYEES & THE NATO SOFA.

A. The NATO SOFA & Division of Personnel.

The NATO SOFA was signed on June 19, 1951, ratified by the Senate in 1953, and entered into force with respect to the United States on August 23, 1953. 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67. The NATO SOFA is the only SOFA that has been ratified by the Senate.

1. Elements of the U.S. Presence.

   a. The "force" is comprised of military personnel. NATO SOFA, Art I, 1(a).

   b. The "'civilian component' means the civilian personnel accompanying a force ... who are in the employ of an armed service of that Contracting Party." NATO SOFA art I.1(b). For U.S. Forces, the civilian component is comprised of the U.S. civil servants (including appropriated and non-appropriated employees) employed in Europe. For a discussion of restrictions on membership in the civilian component see page 38.

   c. A "'dependent' means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or

her for support." NATO SOFA art I.1(c).

2. Interaction of NATO SOFA Status as Members of the Force, Civilian Component and Dependent. It is the U.S. position and practice that individuals in one status under the SOFA can move to another status depending on the circumstances. Consider an individual who is a dependent spouse, who applies and is selected for an appropriated fund or NAF position on base - the spouse would have status as a dependent, and for work-related matters, as a member of the civilian component as well. Further, if the spouse also happens to be a member of the reserves, the spouse would also be member of the force while in a military status - a SOFA trifecta.

   a. What status the US Forces would assert for the individual would depend on the circumstances at the time. If the individual was in their military reserve status we would assert they were a member of the force. If the individual was acting as a civilian employee, we would assert they were a member of the civilian component. If they were caught shoplifting off base during non-duty hours, then they would have dependent status.

   b. While it is easy for a dependent to move between the various SOFA categories, the transition by a member of the force to a civilian component status can be complicated by the fact that they won't have the right passport and, depending on the host nation's immigration policy, may lack the necessary entry visa.

3. Host National Employees. "Local civilian labor requirements of a force or component shall be satisfied in the same way as the comparable requirements of the receiving State ... The conditions of employment and work, particularly wages, supplementary payments and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State." NATO SOFA art. IX.4. For a discussion of restrictions on membership in host-national employment, see page 13.

4. The SOFA & Bilateral Agreements. There is only one SOFA for NATO, i.e., there is no "Italian SOFA," "German SOFA," etc. But, the NATO SOFA is typically supplemented with bi-lateral agreements between the U.S. and the European host-nations which further define membership in these components.

B. Why Host Nation Employment Laws Apply to Host Nationals Working For the US Forces. It's in the NATO SOFA. "The conditions of employment and work, particularly wages, supplementary payments and

conditions for the protection of workers, shall be those laid down by the legislation of the receiving State." NATO SOFA art. IX.4. Also, the Foreign Service Act of 1980, and its predecessor, provides that federal agencies should model their employment and pay programs on the prevailing practice in the locality consistent with the public interest. 22 U.S.C. 3968 (predecessor section 889). These requirements are reflected in many DOD instructions recounted later in the outline.

C. <u>Direct & Indirect Hire Systems</u>. The U.S. Forces in Europe operate "direct hire" systems, that is, the U.S. Forces are the direct employer of the host nation employees, and "indirect hire" systems where the host-nation Ministry of Defense (MOD) is the actual employer of the host nation employees. DOD 1400.25-M SubChapt 1231.4.2 (December 1996).

1. U.K. - U.S. Forces operate both direct hire and indirect hire systems.

2. Spain - U.S. Forces operate an indirect hire system. Spanish employees are under contract with the Spanish MOD, i.e., they are not MOD civil servants.

3. Italy - U.S. Forces operate a direct hire system.

4. Greece - U.S. Forces operate an indirect hire system. Greek employees are under contract with the Greek MOD, i.e., they are not MOD civil servants.

5. Iceland - a unique system that has elements of both the direct hire and indirect hire systems.

D. <u>DOD & EUCOM Policy on Employment Outside the United States</u>.

1. <u>DOD Dir 1400.6</u> "DoD Civilian Employees In Overseas Areas" (ASD(MRA&L) Feb. 15, 1980). Establishes basic policy for overseas employment.

   <u>3. POLICY</u>

   3.1. When using civilian staffing support in overseas areas, each Military Service commander shall employ a civilian manpower mix -- U.S. citizens and local nationals -- that blends financial prudence, conformance with host country agreements or treaties, availability of qualified local national personnel, and the desired low-key presence of the U.S. Government abroad.

3.2. When it is advantageous to employ civilian employees in overseas areas, maximum use shall be made of U.S. and non-U.S. citizens available locally. Unless precluded by treaties or other agreements that give preferential treatment to local nationals, preference shall be given to dependents of military and civilian personnel as provided in DoD Instruction 1400.23 ["Employment of Dependents of Military and Civilian Personnel Stationed in Foreign Areas" (Sept. 18, 1974)]. Personnel transferred from or recruited in the United States shall be limited to key personnel, those regarded as essential for security reasons, or those possessing skills that are not available locally.

3.10. When permitted by U.S. and host country treaty or agreement, U.S. law, and management considerations, the Department of Defense shall pattern its employment conditions for locally hired non-U.S. citizen employees after the customs and practices of the area (DoD Instruction 1400.10, ["Utilization by United States of Forces of Local Nationals in Foreign Areas" (June 8, 1965]). Compensation for such employees shall be based upon locally prevailing rates of pay. These employees shall receive the necessary training to equip them to perform their duties, make them more productive, and qualify them for advancement.

2. DOD 1400.25-M, "DOD Civilian Personnel Manual" (USD(P&R) December 1996). The basic manual for civilian personnel issues. Subchapter (SC) 1231 covers employment of Foreign Nationals.

    a. It does not apply to Civilian Marine Personnel of the Military Sealift Command or foreign national employees serviced by U.S. Embassies. SC1231.2

    b. To reduce the need to import U.S. civil servants into foreign countries, foreign nationals shall be employed as extensively as possible by the U.S. Forces consistent with any agreement with the host nation and DOD family member hiring policies. SC 1231.4.1.2.

    c. The provisions of the foreign national employment system in a foreign country apply uniformly to all elements of the U.S. Forces. SC1231.4.2.

    d. Provides that foreign national employees shall be afforded conditions of employment that are based on prevailing practices, local law, and customs, and are generally equivalent to those enjoyed by persons with similar skills and in similar

occupations in the general economy of the host country. SC 1231.4.3.6.

e. Labor Relations. We should follow whatever the prevailing practices are with respect to labor management relations - to the extent they are compatible with basic management needs of the U.S. Forces. SC 1231.4.3.10, *referencing* SC 1231.4.1.1.

3. ADCON - Authority of the Service Commanders & Combatant Commanders. The service commanders in a combatant command retain administrative control over personnel management - the combatant command may require notice and coordination of personnel actions, e.g., RIFs, but it is the service commanders who have the authority of personnel management. The combatant commander in Europe is EUCOM and the service commanders are USAFE, USAEUR, and COMNAVEUR-COMSIXTHFLEET.

a. It would seem that combatant commanders have unlimited powers reading just 10 U.S.C. 164(c).

b. But, the Secretary of a military department is responsible for the administration and support of forces assigned by the Secretary to a combatant command. 10 U.S.C. 165(b).

c. Administrative Control (ADCON) is defined as, "Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources ... , personnel management ... , and other matters not included in the operational missions of the subordinate or other organizations." Joint Publication 0-2 "Unified Action Armed Forces," at GL 4 (July 10, 2001).

d. The authority vested in the Secretaries of the Military Departments in the performance of their role to organize, train, equip, and provide forces runs from the President through the Secretary of Defense to the Secretaries. Then, to the degree established by the Secretaries or specified in law, this authority runs through the Service Chiefs to the Service component commanders assigned to the combatant commands and to the commanders of forces not assigned to the combatant commands. This administrative control (ADCON) provides for the preparation of military forces and their administration and support, unless such responsibilities are specifically assigned by the Secretary of Defense to another DOD component. Joint Publication 0-2 "Unified Action Armed Forces," Chapt. 1, ¶ 9

(July 10, 2001).

e. The Services are responsible for determining Service force requirements to support national security objectives and strategy and to meet the operational requirements of the Combatant Commands. DOD Dir 5100.1 "Functions of the Department of the Defense and its Major Components" ¶ 6.5.1 (DA&M August 1, 2002).

4. European Command (EUCOM) policy is that "applicable labor legislation, local customs and practices will be followed in the employment and management of LN [host national employees] to the maximum extent, consistent with international agreements, U.S. laws and operating requirements of the U.S. Forces." EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" ¶7.a.(4) (July 6, 1999).

E. Employment at U.S. Embassies. U.S. embassies are the "other" American civil service system overseas - the NATO SOFA does not apply to military or civilian personnel assigned to the Chief of Mission at our embassies. The principal international agreements dealing with embassies are the Convention of Vienna of April 18, 1961, on Diplomatic Relations (the "Vienna Convention on Diplomatic Relations") and the Convention of Vienna of April 24, 1963, on Consular Relations, (the "Vienna Convention on Consular Relations").

F. Employment with NATO. Employment at the various NATO headquarters is another "other" employing American civilians overseas - although in this case, not as American civil servants. The "Treaty of Paris," July 26, 1961, covers NATO Headquarters personnel. It applies not only to SHAPE headquarters but to subordinate NATO headquarters as well, for example, the personnel assigned Joint Force Command (JFC) in Naples (previously Allied Forces South (AFSOUTH)).

III. U.S. LAWS & REGULATIONS APPLICABLE TO HOST NATIONAL EMPLOYMENT.

A. U.S. Interpretation of International Agreements & International Law.

1. Treaties & Executive Agreements. Treaties are international agreements entered into with advice and consent of Senate. Executive Agreements

are international agreements entered into by the United States without advice and consent of the Senate. Nevertheless, while "an executive agreement ... does not require the advice and consent of the senate before becoming effective, and is not a 'treaty' in the constitutional sense ... under international law executive arguments [sic] such as the [Korean] SOFA are considered treaties, and as such, become the law of the land and supersede prior inconsistent domestic law." B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980) (emphasis added), *citing Rossi v. Brown*, 467 F. Supp. 960 (D.C. 1979), *and cases cited therein*; *Weinberger v. Rossi*, 456 U.S. 25, 102 S. Ct. 1510 (1982). (Perhaps the broadest statement of the president's powers in foreign relations, that the president has extra-constitutional powers in the field of foreign relations, was advanced in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).)

2. Interaction of International Agreements & Subsequent Domestic Law. A "subsequent act of Congress supersedes an inconsistent international agreement only if the purpose of Congress to supersede the agreement is clearly expressed." B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980), *citing see Rossi v. Brown, supra, Cook v. United States,* 288 U.S. 102 (1932).

B. Statutory Structure Relating to Host National Employment. Many laws applicable to foreign national employment are found in the Foreign Relations provisions of the U.S. Code at Title 22 with other relevant provisions scattered in Title 5 and Title 10.

1. Foreign Service Act of 1980. While written primarily for the U.S. State Department, the Act allows other U.S. agencies overseas to establish overseas employment programs. 22 U.S.C. 3968(b). The statutes refer to host national employees as "foreign national employees." *E.g.*, 22 U.S.C. 3968(a)(1). The Secretary of State has statutory authority to issue government-wide "regulations governing the establishment and administration of local compensation plans" but has not done so. 22 U.S.C. 3968(c).

2. Classification Act of 1949, 5 U.S.C. 5101. Describes the types of U.S. civil service pay plans. This Act is interpreted as a limit on hiring U.S. citizens as foreign national employees.

3. Pay – Basic Authorization for Pay of Foreign National Employees, 10 U.S.C. 1584.

4. Pay - Congressional Pay Cap on Host National Pay Raises. In § 8002 of

the annual DOD Appropriations Act codified at 10 U.S.C.A. 1584 (note).

5. Pay - Maximum Salary for Foreign National Employees. The maximum salary limit applies where an agency "is authorized to fix by administrative action the annual rate of basic pay ... ." 5 U.S.C. 5373(a).

6. Base Closures and Severance Pay for Foreign National Employees, 10 U.S.C. 1597.

7. Foreign National Employees Separation Pay Account, 10 U.S.C. 1581(a), (e).

8. Wage Surveys for the U.S. Federal Wage System (blue collar system) are generally discussed at 5 U.S.C. 5344. Wage surveys can be used to set foreign national pay.

C. DOD Directives & Manuals Regarding Foreign National Employees.

1. DOD Dir 1400.6 "DoD Civilian Employees In Overseas Areas" (ASD(MRA&L) Feb. 15, 1980). Establishes basic policy for overseas employment.

2. DOD Dir 1400.25 "DOD Civilian Personnel Management System" (ASD (FMP) November 25, 1996). The Assistant Secretary of Defense for Force Management Policy, within the office of the Under Secretary of Defense for Personnel and Readiness, is responsible for promulgating DOD Publications to implement DoD policy and civilian personnel management procedures. Largely, implemented by the "DOD Civilian Personnel Manual," DOD 1400.25-M (USD(P&R) December 1996).

3. DOD Dir 5120.39 (Ch 1.), "Department of Defense Wage Fixing Authority - Appropriated Fund Compensation" (ASD(MRA&L) Nov. 16, 1994).

4. DOD Dir 5120.42 (Ch. 1), "Department of Defense Wage Fixing Authority - Non-appropriated Fund Compensation Programs" (ASD(MRA&L) Nov. 16, 1994).

5. DOD 1400.25-M, "DOD Civilian Personnel Manual" (USD(P&R) December 1996). The basic manual for civilian personnel issues.

6. DOD Manual 1416.8-M "Manual for Foreign National Compensation" (ASD(FM&P) January 1990). Contains detailed procedures for conducting wage surveys and the administration of foreign national

compensation programs.

D. Service Instructions.

1. SECNAVINST 5402.28A "Delegation of Authority for Determining Compensation and Conditions of Employment of Non-U.S. Citizen Employees in Overseas Areas" (OP-141C3 July 27, 1984).

E. EUCOM & Tri-Service Instructions.

1. EUCOM Dir 30-2 "Personnel - Coordination of Policy Development, U.S. Civilian Personnel" (July 24, 1995).

2. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" (July 6, 1999).

3. For Italy - The "Tri-Component Instruction" CINCUSNAVEURINST 5840.2D, USAREUR Reg 550-32, USAFE Inst. 36-101, "Regulations on Personal Property, Rationed Goods, Motor Vehicles and Drivers' Licenses, Civilian Component Status, and Access to Facilities by Italian Labor Inspectors" (April 4, 2001). A cats-and-dogs instruction as per title, includes the rules for determining civilian component status.

F. Commander U.S. Naval Forces Europe Instructions (COMUSNAVEUR INST), previously this command was the Commander in Chief, U.S. Naval Forces Europe (CINCUSNAVEUR or CNE).

1. COMUSNAVEUR INST 5450.15F "Functions and Tasks of the Commander, U.S. Naval Forces Europe Force Civilian Personnel Director; Director, Civilian Personnel Programs; And Command Deputy Equal Employment Opportunity Officer" (CNE 016 July 21, 2003).

2. COMUSNAVEUR INST 5830.2C "Administrative Investigations" (CNE 013 June 14, 2001), includes mention of litigation reports which is out of date with respect to litigation reports for cases in foreign courts.

3. CINCUSNAVEUR INST 12000.1 "Personnel Manual for United Kingdom Employees" (CNE 016 12 Jan 01).

IV. EUROPEAN UNION EMPLOYMENT LAW.

A. EU Law Constitutes a Backdrop. Although the U.S. is not a member of the European Union (EU), EU laws on employment provide a backdrop to employment law in the member countries. Typically, member nations have to pass laws to implement EU laws or directives. (EU regulations, on the other hand, apply to member states immediately.) EU laws and directives then become a condition of employment of the host nation and applicable to the U.S. Forces employment of host nation employees by NATO SOFA art. IX.4. EU directives will play an increasingly important role in employment by U.S. Forces in Europe.

1. EU Regulation 1612/1968 prohibits EU national origin discrimination in hiring by employers in EU member countries. In other words, local employers cannot have a preference for employees of a particular EU nationality, e.g., no preference for Italians in Italy etc.

2. The most important of recent EU directives affecting Italian employment are directives on:

   - Part-time workers (EU Dir 81/1997);

   - Fixed-term workers (CE70/1999); and

   - Parental leave (CE 34/1996).

3. Near-term EU initiatives include:

   - Telework;

   - Temporary work agencies.

B. The Rome Treaty (1957), established the "Common Market" and contained embryonic social policy. Provided for:

1. Free Movement of Workers (Art. 39) including:

   a. Abolition of restrictions on movement of workers;

   b. Rights of entry and residence;

   c. Social security coordination - regulating social security payments as the employee moves from country to country.

2. Equal pay for equal work for male and female employees. Rome Treaty, Article 140. Four directives on Equal Treatment have been issued.

3. Harmonization of Legislation on Worker Protection. Directives have been issued on collective redundancies (RIFs), transfers of businesses, and employer insolvency. The directives allowed the member nations to implement by different means, e.g., legislation or "arrangements" between management and labor.

C. **Single European Act (1986)**. Marked a shift from the Common Market, which was never really achieved, to a Single European Market allowing for the movement of capital, labor and goods. Established a Council of Ministers with "weighted voting" known as Qualified Majority Voting.

1. Covered Worker Health and Safety.

2. Working Time Directive issued in 1993, included items such as mandatory rest times.

3. Charter of Fundamental Social Rights of Workers (1989).

D. **Maastricht Treaty (1992)**. Generally known for aiming for a Social Europe with "Two Speeds," one speed for 14 of the member states with a second (slower) speed for the UK. Employment directives issued under the treaty include:

1. European Works Council Directive (No. 45/1994);

2. Parental Leave Directive (1996);

3. "Burden of Proof" Directive (1997) reversing the burden of proof in sex discrimination cases;

4. Part-time Work Directive (1997).

E. **Amsterdam Treaty (1997, effective May 1, 1999).**

1. Part of a response to unemployment problems and the need to create jobs in the EU.

2. Added Article 13 to the 1957 Rome Treaty, dealing with discrimination on the basis of race, ethnic origin, religion and sex. The concern was

driven in part over expansion of the EU into former Warsaw Pact nations. Article 13 needs to be implemented by member nations in their domestic law.

3. Eliminated the "two speed" program; UK now fully joined.

4. Stronger emphasis on Gender Equality. Allows for "positive discrimination" (affirmative action(?)). Member states may provide advantages for under-represented group (legislative note relates the under-represented group is women) in professions.

5. Chapter on Employment Policy calling for:

   a. A coordinated employment strategy;

   b. EU employment guidelines replaced the attempt at harmonization of the rules; and

   c. Measures to stimulate employment.

V. EMPLOYMENT PROGRAMS FOR HOST NATIONAL EMPLOYEES.

A. Basic Authorization for Host National Employment Programs.

1. "Local civilian labor requirements of a force or component .. ." NATO SOFA art IX.4.

2. Basic Authorization for Overseas Employment Programs. Although §3968 was written for the Department of State, all U.S. agencies operating overseas are authorized to establish employment programs for foreign national employees. 22 U.S.C. 3968(b).

3. Basic Authorization for Position Classification. Federal agencies operating overseas "shall establish compensation (including position classification) plans for foreign national employees ... ." 22 U.S.C. 3968(a)(1) (parenthetical comment in original).

4. Basic Definition of Employee Under Title V. "For the purpose of this title [Title V], 'employee', except as otherwise provided by this section or when specifically modified, means an officer and an individual who is

   (1) appointed in the civil service by one of the following acting in an official capacity ... (C) a member of a uniformed service [or] (C) an individual who is an employee under this section;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position."

5 U.S.C. 2105(a). Presumably, this definition is broad enough to encompass direct hire host national employees. The section 2105 definition should not be confused with the more restricted definitions of "employee" for purposes of adverse actions at 5 U.S.C. 7501(1) and appeals to the Merit Systems Protection Board at 5 U.S.C. 7511(a)(1).

5. Office of Personnel Management (OPM) Rule. "Persons who are not citizens of the United States may be recruited overseas and appointed to overseas positions without regard to the Civil Service Act." 5 C.F.R. 8.3.

B. Eligibility for Host Nation Employment.

1. NATO SOFA. The SOFA simply relates to "[l]ocal civilian labor requirements ... ." SOFA art. IX.4. Either bi-lateral agreements, union contract provisions, or hiring practices typically limit local employees to citizens of the host nation. Note that EU Regulation 1612/1968 prohibits hiring preferences based on citizenship among EU members.

2. Limits on American Citizens Being Hired as Host Nation Employees.

a. The Classification Act of 1949. This Act is interpreted as a limit to hiring U.S. citizens as foreign national employees; the law is commonly misstated as requiring U.S. citizens to be paid in dollars. Instead, the statute provides that the General Schedule (GS) pay system applies to all positions in a federal agency, 5 U.S.C. 5101, except those positions excluded by § 5102. One of the exceptions in §5102(c)(11) is for "aliens or noncitizens" of the U.S. who occupy positions outside the United States, i.e., host national employees. There is no exception from GS for U.S. citizens who occupy positions outside the United States. Another exception from the GS pay schedule is "employees whose pay is not wholly from appropriated funds of the United States." 5 U.S.C. 5102(c)(14).

(1) Thus, if you are a U.S. citizen, you should be employed and paid as a GS, while host national employees are in a separate employment schedule and are paid in local currency. So, U.S.

citizens (including dual nationals) should not be employed as host national employees in appropriated fund positions.

(2) The limit on hiring American citizens as host national employees would not apply to non appropriated fund (NAF) positions which are typically found in Exchange and morale, welfare and recreation (MWR) organizations.

(3) The Classification Act restriction only applies in direct hire countries (e.g., Italy) where the U.S. is the actual employer of the LNs. It does not apply in indirect hire countries where the host nation Ministry of Defense actually employs the LNs, e.g., Greece and Spain.

b. Hiring A U.S. Citizen As A Host National Employee Is Inconsistent With DOD Regulations. A "Foreign National Employee" is defined as a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." DOD 1416.8-M, Manual for Foreign National Compensation, DL 1.1.4. (ASD(FM&P) January 1990).

C. Host National Employee Pay.

1. Basic Rules for Foreign National Pay.

a. DOD's Ability to Fund – Basic Authorization Foreign National Employees Pay. From time-to-time the annual appropriations act has a ban on payment of appropriated funds as salaries to individuals who are not U.S. citizens. Such laws prohibiting the payment of pay or expenses to a person not a citizen of the United States do not apply to DOD personnel. 10 U.S.C. 1584.

b. Pay & The Foreign Service Act of 1980. The key to designing and operating a foreign national employment program is Section 408 of the Foreign Service Act of 1980, codified at 22 U.S.C. 3968, which requires that federal agencies model their employment program on the **prevailing practice in the locality consistent with the public interest.** 22 U.S.C. 3968(a)(1) (predecessor section is 889). With very few exceptions, if an employment practice is a prevailing practice in the locality, the U.S. Forces can implement the practice even if it is contrary to employment practices for American employees, or contrary to U.S. employment or fiscal laws. Under the provisions of 22 U.S.C. 889, "compensation plans for aliens need not be limited by laws and regulations applicable to [American]

employees subject to the civil service laws and regulations generally, and that where such plans are consistent with the local practice and in the public interest, no question would arise as to the availability of appropriations to meet the cost of such plans." 51 Comp. Gen. 123, B-173210, 1971 U.S. Comp. Gen. LEXIS 68 (August 24, 1971). The "prevailing practice in the public interest" is the standard for determining whether an employment practice can be adopted.

(1) Legislative History. The Foreign Service Act of 1946 was amended by adding the "provision in section 889 providing for the setting of compensation plans based on locality prevailing wage rates was added by a 1960 amendment, section 6 of public law no. 86-723, September 8, 1960 (74 Stat. 831) ... ." B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980) (discussing 29 U.S.C. 889, the predecessor to 3968). The provisions of section 889 were modified and transferred to section 3968 in section 408 of the Foreign Service Act of 1980.

(2) The Foreign Service Act of 1980, is PL 96-456, 94 Stat 2071 (Oct 17, 1980). The bills involved were: 96 HR 4674; 96 S. 1450; 96 S. 3025; 96 HR 6790; 96 S. 3058.

c. Congressional Pay Cap on Host National Pay Raises. The pay cap first appeared in the DOD appropriations act in 1987 and then for every year since 1989. Sec. 8002 P.L. 106-79 "DOD Appropriations Act 2000" (25 Oct. 1999) *codified at* 10 U.S.C.A. 1584 (note). It limits pay raises for foreign national employees to the higher of the percentage increase to the basic pay raise for DOD GS employees (i.e., without locality pay) or the percentage increase the host nation gives its own civil servants. Note: there are no Comptroller General decisions interpreting the pay cap on raises.

d. Maximum Salary for Foreign National Employees.

(1) The Statutory Limit. The maximum salary limit applies where an agency "is authorized to fix by administrative action the annual rate of basic pay ... ." 5 U.S.C. 5373(a). "[B]y administrative action" means the agency, not Congress, sets the basic rate of pay. The annual rate of basic pay cannot be fixed at a rate more than the rate for level IV of the Executive Schedule. 5 U.S.C. 5373(a). The annual rate of basic pay for an employee paid from nonappropriated funds may not be fixed at a rate greater than the rate for level III of the Executive Schedule. 5 U.S.C. 5373(b).

(2) DOD Limits - The "Manual for Foreign National Compensation." "The total annual pay for an employee established under the delegated authorities may not be more than the maximum payable rate for General Schedule (GS)-18." DOD 1416.8-M ¶C1.2.3.2.3. (ASD(FM&P) January 1990).

(3) DOD Limits - "DOD Civilian Personnel Manual." "The total pay for an individual established under delegated authorities may not be more than the maximum payable rate for Executive Level IV." DOD 1400.25-M SubChapt 1231.5.3.3 (USD(P&R) Ch.2 January 12, 1998) (emphasis added). GS-18 and Executive Level IV pay, are the same. The GS-18 grade was eliminated between the 8 years of the two instructions.

(a) Positions at grades GS-16, GS-17, and GS-18, were replaced by Senior Level (SL) Positions under the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509). SL positions are classified above GS-15 of the General Schedule but are ungraded. U.S. Office of Personnel Management, Operating Manual Update, "Glossary of Terms Used in Processing Personnel Actions" at 35-13 (Update 35 October 1, 2000), *citing* 5 C.F.R. part 319.

(4)

Pay/YR	2001	2002	2003
GS-18*	$96,652 - 125,700	99,096 - 130,000	102,168 - 134,000
ES-IV	125,700	130,000	134,000
ES-III	133,700	138,200	142,500

* Range for SL pay.

(5) The Executive Schedule (ES) levels of pay should not be confused with the Senior Executive Service (SES) pay levels. The Executive Schedule has five levels with Level I the highest.

(a) E.S. Level I is for members of the Cabinet, e.g., Secretary of State, Secretary of Defense. 5 U.S.C. 5312.

(b) E.S. Level III is typically for the Under Secretary level, e.g., the Under Secretary of Defense (Personnel Readiness), the Under Secretary of State. 5 U.S.C. 5314.

(c) E.S. Level IV is typically for the Under Secretaries of the three services, e.g., the Under Secretary of the Navy, the Assistant Secretaries of the services, e.g., the Assistant Secretary of the Navy (Manpower & Reserve Affairs), the DOD General Counsel and the General Counsels for the three services. 5 U.S.C. 5315.

(6) The SES on the other hand has six levels (6 being the highest and 1 the lowest). The pay for SES ranges from 120% of GS-15 for SES 1 to Executive Service Level IV for SES 6. 5 U.S.C. 5382(b), 5376(b)(1).

e. DOD & EUCOM Policy on Host National Employee Pay. There are two basic policies regarding the establishment of foreign national pay:

(1) **The average pay** of foreign national employees of the U.S. Forces shall equal the average pay of the non-U.S. Forces sector in the host nation, DOD Manual 1416.8-M, ¶C1.2.3.1.1 (ASD(FM&P) January 1990); and

(2) **The total compensation** of employees of the U.S. Forces shall equal the total compensation of the non-U.S. Forces sector in the host nation. DOD Manual 1416.8-M, ¶C1.2.3.1.2 (ASD(FM&P) January 1990).

(3) Terms and conditions of employment will be favorable enough to meet existing fair standards in the labor market but not so advantageous as to create a privileged group within the country. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" ¶7.a.(6) (July 6, 1999).

(4) Compensation levels and conditions of employment should normally be comparable to those governing similar occupations in the host nation economy, or, when appropriate, comparable to similar wage and salary scales of the host nation civil service. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" ¶8.a.(3)(a) (July 6, 1999) .

(5) "If inclusion of the host government (national, state, and local levels) is not feasible, document the reasons for its exclusion and include the documentation in the country plan or in survey reports to the ASD(FM&P)." DOD Manual 1416.8-M "Manual

for Foreign National Compensation" ¶C3.2.7 (ASD(FM&P) January 1990).

f. Interest Bearing Accounts Are Authorized. "[P]ayments by the Government and employees to a trust or other fund in a financial institution in order to finance future benefits for employees, **including provision for retention** in the fund **of accumulated interest** for the benefit of covered employees." 22 U.S.C. 3968(a)(1)(C) (emphasis added).

g. Social Security Plans. Participation in local social security plans is specifically authorized in the Foreign Service Act. 22 U.S.C. 3968(a)(1).

h. Foreign National Pay & Protection for Comptrollers. The prevailing practice in Columbia (the locality) allowed employees to take advances on their severance pay. The employees however, could lose eligibility for the advance pay if, e.g., they were fired for cause. Because the disqualification, e.g., the termination for cause, could take place after the employee had already borrowed the money, the State Department was concerned that its certifying officers who made the payments would be liable under 31 U.S.C. 82c (1976) for incorrect payments. GAO held not. "As a general proposition, if certifications are made in accordance with the conditions set forth above, then the certifying officer would not be held liable for otherwise proper payments if the FSN employee should subsequently lose his eligibility for severance pay, for causes which did not exist at the time of the payment, or which existed but which the certifying officer did not know of and had no reason to know of." B-192511, 1979 U.S. Comp. Gen. LEXIS 2456 (Comp. Gen. June 8, 1979).

i. The Comptroller General Treats Agency Regulations with Extraordinary Deference. GAO denied payment of a night differential, in part, because the State Department had issued regulations requiring approval in Washington for payment of night differentials, and Voice of America officials in Antigua had failed to get such approval before implementing the differential. *Matter of VOA Relay Station, Antigua*, B-227411, 1988 U.S. Comp. Gen. LEXIS 494 (Comp. Gen. May 19, 1988).

j. Leave Provisions. Statutes discussing leave are somewhat inconsistent.

(1) The Foreign Service Act provides for:

- leave with pay, in accordance with prevailing law and employment practices in the locality without regard to restrictions in U.S. law, 22 U.S.C. 3968(a)(1)(A);

- programs for voluntary transfers of leave and voluntary leave banks, 22 U.S.C. 3968(a)(1)(B).

(2) While the Title 5 provision relates that "alien employees who occupy positions outside the United States" may be granted "leave of absence with pay, not in excess of the amount of annual and sick leave allowable to [American] citizen employees" under Title 5. 5 U.S.C. 6310.

(3) In practice, federal agencies follow the Title 22 provision and provided for leave in accordance with practices in the locality.

(4) Absence Resulting from Hostile Action Abroad. Whether leave is granted to an "alien employee under section 6310 ... or section 408 of the Foreign Service Act of 1980 [22 U.S.C. 3968]" leave may not be charged due to an absence "not to exceed one year, due to an injury - (1) incurred while serving abroad and resulting from war, insurgency, mob violence, or similar hostile action ... ." 5 U.S.C. 6325. Unless, the absence or the mob action (the statute isn't clear) is "due to vicious habits, intemperance, or willful misconduct on the part of the employee." 5 U.S.C. 6325(2). This same provision applies to American civil servants.

2. What the "Prevailing Wage Rate" Criteria Allows Agencies To Do.

a. Advances on Salary Otherwise In Violation of U.S. Laws. The Comptroller General approved advances on salary for SETAF local national (Italian) employees, which for American employees would have violated 31 U.S.C. 529 and 665(a) prohibiting payments in advance of services or in advance of appropriations. This even though there was "no Italian law specifically governing salary advances or loans to personnel of private employers." The Comptroller General approved the payments because "it is local custom and practice for industrial employers to make such payments. ... Accordingly, if the department determines that payments similar to that here involved are in the public interest and the matter of adopting such practice is coordinated with other agencies of the United States operating in Italy, we will not object to the payment of the instant voucher and others similar thereto." B-166917, 1969 U.S. Comp. Gen. LEXIS 2544 (June 10, 1969).

b. Advance Pay.

(1) Prevailing Practice Rule. Despite statutory restrictions ordinarily applicable to federal agencies with respect to advances on pay, advance pay may be provided to host national employees if such payments are the prevailing practice in the locality. B-192511, 1979 U.S. Comp. Gen. LEXIS 2951 (Comp. Gen. February 5, 1979) (advance severance pay).

(2) Advance Pay for Medical Treatment. Up to three months advance pay can be paid to a host national employee who is located outside the country where hired pursuant to agency authorization and "requires medical treatment" outside country where hired. 5 U.S.C. 5927(a)(3).

c. Transfers Between Appropriated Fund and Non-Appropriated Fund Without Loss of Benefits. Executive Agreement between U.S. and the Republic of the Philippines provided that the U.S. Forces were a single employer and employees could transfer between appropriated fund and non-appropriated fund activities without loss of leave, length of service computations, severance pay etc. Under the provisions of 22 U.S.C. 889 "compensation plans for aliens need not be limited by laws and regulations applicable to [American] employees subject to the civil service laws and regulations generally, and that where such plans are consistent with the local practice and in the public interest, no question would arise as to the availability of appropriations to meet the cost of such plans. Therefore, we see no legal objection to regarding the United States Armed Forces in the Republic of the Philippines as one employer in order to permit the benefits in question and to give full effect to the terms of the agreement." 51 Comp. Gen. 123, B-173210, 1971 U.S. Comp. Gen. LEXIS 68 (August 24, 1971).

d. Retroactive Pay Allowed.

(1) Generally, American civil servants have "no entitlement to retroactive pay absent a provision in an employment contract or express statutory authorization." Given the provision of 22 U.S.C. 889, "such limitation would not necessarily apply to foreign nationals employed outside the United States by the United States government" where the prevailing practice in the locality was to make retroactive payments "provided such payments are determined to be consistent with the public interest and the agency pay practice is coordinated with other agencies of the United States operating in Canada." B-191860, 1979 U.S. Comp. Gen. LEXIS 3044 (January 10, 1979), *citing see* 40

Comp. Gen. 650 (1961). The specific situation in Canada was that there was a lag between the expiration of union contracts and the date a new contract was accepted. Not only did Canadian employees receive the pay increase retroactive to the expiration of the prior contract, so too did former employees separated by retirement, resignation, or reduction in force.

(2) GAO allowed retroactive payment of pay where the agency's implementing regulations allow it and it was a prevailing practice in the locality. *Matter of VOA Relay Station, Antigua*, B-227411, 1988 U.S. Comp. Gen. LEXIS 494 (Comp. Gen. May 19, 1988) ("The applicable [internal State Department] regulations pertaining to retroactive increases provide that premium compensation pay, such as night differential, cannot be retroactively granted unless data is available indicating it is a local prevailing practice in the area to grant a retroactive increase.").

(3) Note that the applicable DOD regulation practically forbids retroactive payments. DOD 1416.8-M "Manual for Foreign National Compensation" ¶C3.6 (ASD(FM&P) January 1990).

e. Where There Is No Prevailing Practice - Host national Filipino base guard denied pay for pre-shift muster and relief transport time where local practice in the Philippines was to not pay guards for muster and transportation time. B-186957, 1977 U.S. Comp. Gen. LEXIS 2939 (Comp. Gen. February 9, 1977).

f. Not All Prevailing Practices Are Allowed - The Statute Only Stretches So Far. The agencies are allowed to follow most, but not all, "prevailing practices." In Columbia, it was prevailing practice for employers to advance pay to employees, and if the employee was terminated before the advance was paid off, to waive collection of the advance pay owed. GAO agreed to the advance pay but not to the waiver of collection. The "Department may not, solely because practice of local employers is not to seek recovery, refrain from collection efforts when alien employee loses eligibility for certain compensation. Federal claims collection act mandates attempts to recover." B-192511, 1979 U.S. Comp. Gen. LEXIS 2456 (Comp. Gen. June 8, 1979), *citing* 31 U.S.C. 951-953 (1976). Presumably the failure to collect a debt owed the U.S. government would be inconsistent with the public interest, but oddly, that was never discussed in the decision.

3. Host National Compensation Plan must Be "Consistent with the Public Interest." 22 U.S.C. 3968(a)(1). The public interest requirement is not a separate basis for establishing a component of pay - all pay components must be a prevailing practice **and** consistent with public interest. B-199054 O.M., 1980 U.S. Comp. Gen. LEXIS 2110 (Comp. Gen. December 16, 1980) ("we do not believe that the above-quoted phrase ['to the extent it is consistent with the public interest'] grants authority for an agency to adopt a practice that is not a prevailing wage rate or compensation practice for corresponding types of positions in the locality.")

4. Coordination With Other Federal Agencies. Based on the legislative history of section 889, the Comptroller General wants federal agencies to coordinate implementation of the compensation programs. B-166917, 1969 U.S. Comp. Gen. LEXIS 2544 (June 10, 1969) (salary advances and loans were a prevailing practice and could be adopted by the Army when the "practice is coordinated with other agencies of the United States operating in Italy"); 40 Comp. Gen. 650; B-145804, 1961 U.S. Comp. Gen. LEXIS 141 (May 26, 1961) (purchase of insurance plans for health and retirement programs were a prevailing practice and could be adopted by the State Department which "should be coordinated with other agencies operating in the locality so that the same or a substantially similar practice will be followed by each of the other agencies operating in that area."). Coordination is also required by the DOD Manual for Foreign National Compensation. DOD 1416.8-M C3.5.1.3. (ASD(FM&P) January 1990).

5. How a Prevailing Practice Is Determined in DOD. The Comptroller General issued a decision interpreting "prevailing wage rates and compensation practices" in 22 U.S.C. 889(a), the predecessor to 22 U.S.C. 3968(a)(1), which is recounted in the DOD Manual for Foreign National Compensation. DOD 1416.8-M C3.5.1 (ASD(FM&P) January 1990), *quoting* 40 Comp. Gen. 650, B-145804, 1961 U.S. Comp. Gen. Lexis 141 (May 26, 1961). To be a prevailing practice:

   a. The practice should be substantially followed by local employers in the area, C3.5.1.1;

   b. Adoption of the practice should be consistent with the public interest, C3.5.1.2;

   c. The manner of adopting the practice should be coordinated with other U.S. government agencies so that the same or a substantially similarly practice will be followed by each Agency operating in that area, C3.5.1.3;

d. Plus DOD provides "the following additional guidance":

(1) An employment practice shall be considered to be a prevailing practice when a majority of survey firms employing a majority of the survey population follows the practice. C3.5.2.1.

(2) Any rate or level paid by a simple majority of the survey firms shall be considered to be a prevailing practice, providing the number of employees at the rate or level exceeds the number receiving any other rate or level. C3.5.2.1.2.

(3) Application of the two provisions above "must be consistent with operational requirements and compatible with the basic management needs of the U.S. Forces." C3.5.2.2.3.

D. DOD Directives & Manuals Regarding Host National Employee Pay.

1. DOD 1400.25-M, "DOD Civilian Personnel Manual" (USD(P&R) December 1996). Subchapter 1251 covers Compensation of Foreign Nationals.

   a. Does not apply to MSC civilian marine personnel or foreign national employees serviced by U.S. embassies. S.C. 1251.2.

   b. The Assistant Secretary of Defense for Force Management Policy (ASD(FMP)) reporting to the Under Secretary of Defense (Personnel and Readiness) (USD(P&R), has program responsibility and approve exceptions to the provisions of DoD 1416.8-M. S.C. 1251.4.1.

   c. The DOD Civilian Personnel Management Service (CPMS) provides technical advice on compensation and reviews reports of country compensation plans. S.C. 1251.4.2.

2. DOD Manual 1416.8-M "Manual for Foreign National Compensation" (ASD(FM&P) January 1990). Contains detailed procedures for conducting wage surveys and the administration of foreign national compensation programs. (Superseded DOD 1416.8-M "DoD Manual for Foreign National Compensation (Dec 1980).)

   a. The Manual represents "the preferred methodology for wage determination ... ." Departure from these procedures must receive prior approval of the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)). DOD 1416.8-M

¶C1.2.3.1.1.1. (ASD(FM&P) January 1990).

(1) Unresolved differences [presumably between the services] relating to ... wages ... shall be referred by the cognizant commander in chief to the ASD(FM&P). ¶C1.2.3.2.1.

(2) Deviations from the prevailing practice, sometimes referred to as **public interest determinations**, shall be referred by the cognizant commander in chief to ASD(FM&P).

b. The Manual **does not** apply:

(1) To designated DOD units authorized to use the Dept of State Joint Compensation Plan for Local Employees - instead an interagency Memorandum of Agreement applies. Typical units that the Manual does not apply to are the U.S. Information Agency, military or agricultural attachés, AID Missions, and such. The Memorandum of Agreement is in DoD 1416.8-M app. 1 (January 1990).

(2) To indirect hire systems where the U.S. Forces, by agreement, use host government compensation system, and the U.S. Forces do not retain pay fixing authority; however, the total compensation comparability provisions apply in all cases. DOD Manual 1416.8-M, Forward (ASD(FM&P) January 1990).

(3) Nevertheless the Manual "shall be used to establish bargaining parameters for agents negotiating for the U.S. Forces in indirect hire situations where country-to-country or other agreements provide for the negotiation of wages and benefits." DOD Manual 1416.8-M, Forward (ASD(FM&P) January 1990).

c. Definitions:

(1) "Foreign National Employee" is a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." ¶DL1.1.4.

(2) "Base Pay" is that "part of U.S. Forces total pay" from which "premium pay and certain other allowances" are computed. ¶DL1.1.1.

(3) "Benefit Component" is the "fringe benefits granted by U.S. Forces to foreign national employees" and by host nation "employers to their employees." ¶DL1.1.2.

(4) "Consolidated Allowance" is an "allowance paid by the U.S. Forces to represent a wide variety of non-U.S. Forces pay that is considered in arriving at total pay for positions comparable to U.S. Forces positions." ¶DL1.1.3.

(5) Pay and Benefit Components are listed in DOD 1416.8-M app. 2 (January 1990).

d. Grading Structures & Classification.

(1) All components of U.S. Forces must adopt and uniformly apply the same grade and step-rate structure within a country. Manual 1416.8-M, ¶C2.1 (ASD(FM&P) January 1990).

(2) Host nation prevailing practices are the key to the grade structure and classification for host nation employees. The U.S. GS and FWS grade structures may be used if compatible with host nation practices, otherwise an alternative has to be developed. ¶¶C2.2. & C2.3.

e. Wage Surveys & Benefit Analysis. Chapter 3 contains an extensive discussion on how to conduct full-scale wage surveys including regression analysis while Chapter 4 discusses benefits. "A full-scale survey includes developing a current sample of establishments and collecting salary, wage, and benefit data by visits to these establishments." C3 Introduction. The discussion of benefits analysis provides general guidelines. Update Surveys are discussed in Chapter 5. Reports are discussed in Chapter 7.

(1) Full-scale wage surveys should be done "at least very 3 years, or more frequently if economic conditions are unstable." ¶C3 Introduction.

(2) Update surveys are conducted in intervening years.

(3) The wage survey area "normally encompasses the area surrounding the U.S. Forces work sites within which the predominant number of employees reside, and within which workers may change employers without changing residences." ¶C3.2.6.1. The survey area can be expanded if there is an insufficient industrial base or significant recruitment from elsewhere. ¶C3.2.6.1.

Comment: The instruction does not explain why host-nation companies should be

interested in taking the time and expense to participate in the studies. Nor does the instruction authorize payment to these companies.

(4) Survey industries should come "from the broadest feasible universe of non-U.S. Forces industries, including civilian and military branches of the host government. If inclusion of the host government (national, state, and local levels) is not feasible, document the reasons for its exclusion and include the documentation in the country plan or in survey reports to the ASD(FM&P)." ¶C3.2.7.

(5) To avoid the appearance of a conflict of interest, the instruction suggests that each data collector team have no more than one host national employee member. ¶C3.3.2.

f. Alternatives to Surveys. The alternatives discussed in Chapter 6 do not applicable to the European Theater.

Comment: The discussion on alternatives to surveys does not include purchasing wage data from employer federations.

g. When Do Pay Raises Become Effective? "The general policy for selecting the effective date for changes in compensation and conditions of employment is that such changes shall be effective no earlier than the date competent administrative authority (in this case the component to whom wage fixing authority has been delegated) takes final action to approve changes. ... Unless unquestionable legal authority for retroactive changes exists, all changes in compensation and conditions of employment shall be effective no earlier than the date the wage fixing authority takes final action to approve the changes." DOD 1416.8-M ¶C3.6 (ASD(FM&P) January 1990).

(1) Exceptions to the general policy can be justified under the authority of "specific provisions of controlling treaties and agreements" or the Foreign Service Act of 1980 "if supported by local custom and practice." ¶C3.6.

(2) The statute providing for retroactive pay, 5 U.S.C. 5344, is only applicable to U.S. citizens and "cannot be used as the authority for retroactive adjustments for foreign national employees." ¶C3.6.

(3) See page 19 for decisions on retroactive pay.

E. Base Closures and Severance Pay for Foreign National Employees.

1. The Secretary of Defense is required to have guidelines for the manner in which reductions in the number of civilian positions in DOD are carried out during a fiscal year. 10 U.S.C. 1597(a) & (b). The guidelines shall include positions for reviewing civilian procedures in the following order:

   a. Positions filled by foreign national employees overseas;

   b. All other positions filled by civilian employees overseas;

   c. Overhead, indirect, and administrative positions in headquarters or field operating agencies in the United States;

   d. Direct operating or production positions in the United States.

   10 U.S.C. 1597(b).

2. The Treasury has an account "known as the 'Foreign National Employees Separation Pay Account, Defense'. The account shall be used for the accumulation of funds to finance ... separation pay for foreign nationals ..." who are "employed by the Department of Defense, and foreign nationals employed by a foreign government for the Department of Defense" where separation pay is provided for in a contract, treaty, or memorandum of understanding with a foreign nation. 10 U.S.C. 1581(a), (e).

3. Severance pay is not available however, "if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country." 10 U.S.C. 1592.

VI. ADMINISTRATION OF HOST NATIONAL EMPLOYMENT IN EUROPE.

A. Joint Personnel Committees. The Combatant Command Commander shall establish joint personnel committees with DOD Component representation as applicable to the situation. The committees may be established on an area or country basis. Consideration will be given to participation by other parties such as other government agencies or allied forces. DOD 1400.25-M "DOD Civilian Personnel Manual" SC 1231.4.5 (USD(P&R) December 1996).

1. At least with respect to coordination within the services, the Joint Civilian Personnel Committees (JCPCs) fulfill the requirement that foreign national pay issues be coordinated among overseas agencies.

DOD 1416.8-M "DOD Manual for Foreign National Compensation" C3.5.1.3 (ASD(FM&P) January 1990); B-166917, 1969 U.S. Comp. Gen. LEXIS 2544 (June 10, 1969) (salary advances and loans were a prevailing practice and could be adopted by the Army when the "practice is coordinated with other agencies of the United States operating in Italy"); 40 Comp. Gen. 650; B-145804, 1961 U.S. Comp. Gen. LEXIS 141 (May 26, 1961) (purchase of health and retirement insurance plans could be adopted by the State Department which "should be co-ordinated with other agencies operating in the locality so that the same or a substantially similar practice will be followed by each of the other agencies operating in that area.").

2. Among the primary responsibilities of the JCPCs is to set pay for host national employees and conduct negotiations with host national unions.

   a. Recall that the NATO SOFA provides that, "The conditions of employment and work, particularly wages, supplementary payments and conditions for the protection of workers, **shall be those laid down by the legislation of the receiving State**." Article IX.4 (emphasis added). Where we are the direct hire employer in Europe, the result is that the JCPCs typically end up negotiating labor contracts (often titled "conditions of employment") with host national labor unions.

   b. For "direct hire employees (paid from either appropriated or non appropriated funds), the joint committee shall seek to establish a uniform position on salaries, wages, fringe benefits, and other terms of employment for foreign national employees. The terms of employment established shall be in accordance with the provisions of controlling treaties, administrative and labor management agreements, and this Subchapter." DOD 1400.25-M "DOD Civilian Personnel Manual" SC 1231.4.5.1 (USD(P&R) December 1996).

B. **SECNAVINST 5402.28A** "Delegation of Authority for Determining Compensation and Conditions of Employment of Non-U.S. Citizen Employees in Overseas Areas" (OP-141C3 July 27, 1984). Implements DOD instructions on foreign-national pay. Provides the delegation of authority from SECNAV through CNO to the Commander U.S. Naval Forces Europe (NAVEUR) with respect to compensation and other terms and conditions of employment for foreign nationals in appropriated and non-appropriated fund Navy positions. ¶ 4a.

1. Requires that joint personnel committees with Service Component Commander (i.e., Army and Air Force) representation as applicable (i.e.,

if the service has employed foreign national personnel in a country). ¶ 5b.

2. Provides that NAVEUR representatives "will act as an agent of the Secretary of the Navy and are empowered to act for the Department on matters before the joint committee." ¶ 5b.

3. NAVEUR will ensure representation of interests of both appropriated and nonappropriated fund activities on the Joint Committee. ¶ 5b.

4. If the Joint Committees (e.g., the Joint Civilian Personnel Committee (JCPC) - Italy) cannot establish a uniform position with respect to wages and other terms and conditions of employment then:

   - "Unresolved differences in **compensation** and other terms and conditions of employment" will be referred to the Unified Commander, i.e., to EUCOM. ¶ 5d.

   - Matters having **significant budgetary or legal implications, major policy issues or impacts on manpower ceilings** may be referred to the Assistant Secretary of Defense (Manpower, Installations and Logistics) or the Secretary of the Navy, as appropriate. ¶ 5d.

C. U.S. European Command (EUCOM) & Tri-Component Instructions.

1. EUCOM Dir 30-2 "Personnel - Coordination of Policy Development, U.S. Civilian Personnel" (July 24, 1995). The purpose of the instruction is to ensure satisfactory operation of civilian personnel programs and polices and to preclude conflicts among the services. Requires 30-days advance coordination among the services and EUCOM when a civilian personnel policy has a "potential for significant impact on the theater with counter-part component commanders." ¶ 7.b.(1).

2. EUCOM Dir 30-6 "Personnel - Administration of Civilian Employees in the U.S. European Command (USEUCOM) Area of Responsibility (AOR)" (July 6, 1999). Describes the policies and procedures for organizing and operation of Joint Civilian Personnel Committees (JCPC, previously CPCCs) and the EUCOM Civilian Personnel Committee (ECPC).

   a. Proposed changes to U.S. laws or regulations affecting operating procedures within the EUCOM area of responsibility should be routed through the EUCOM Civilian Personnel Committee (ECPC). ¶¶ 7.b., 8.b.

b. Unless DOD has approved an alternative method, wage and benefit surveys will be used to determine prevailing wage rates and compensation schedules. ¶8.a.(e).

c. Responsible Coordination Commanders, ¶ 9.b:

(1) U.S. Army Europe (USAREUR) is responsible for coordination in Germany, Belgium, Luxembourg and the Netherlands.

(2) U.S. Navy Europe (NAVEUR) is responsible for Greece, Italy, Spain, and direct hire foreign nationals in the UK.

(3) U.S. Air Forces Europe (USAFE) is responsible for Denmark, Norway, Turkey, and indirect hire foreign nationals in the UK.

d. EUCOM ECJ1 (Personnel) will:

(1) In conjunction with service components, represent U.S. Forces in formal negotiations with host nations, ¶9.c(3).

(2) Establish JCPCs in countries as required and monitor as necessary. ¶9.c(4).

e. Responsible Component (Coordination) Commanders Shall:

(1) Be the principal point of contact on joint service matters on labor policy with appropriate representatives of the host governments, CINCEUR, CINCEUR contact officers, and U.S. Embassies. ¶9.d.(1).

(2) Inform CINCEUR, CINCEUR contact officers, U.S. Embassy, other affected component commanders, and host nation agencies, when appropriate, in advance of matters which may affect U.S. - host nation country relations because of their political or economic impact, such as RIFs, and strikes. ¶9.d(2).

(3) For each country they are responsible for, appoint a representative to serve as the JCPC Chair (normally the Director of Civilian Personnel). ¶9.d(3).

(4) Afford full consideration to participation of other parties such as other allied forces, U.S. government agencies, and Exchanges. ¶9.d(7).

f. Joint Civilian Personnel Committees (JCPC). "The JCPC will serve as a medium through which the responsible commander will discharge his/her responsibilities for LN [host national] personnel in the country concerned." App B, ¶ B-4a.

(1) Among other duties the JCPC will:

- Refer to CINCEUR for guidance or resolution on those matters on which the components cannot agree. App B, ¶ B-4b(3).

- Advise CINCEUR and component commanders of the results of any discussion furthering JCPC business or actions. App B, ¶ B-4b(4).

(2) Each component command (Army, Navy, Air Force) gets a voting member when they employ foreign nationals in that country. The chair is the responsible commander's representative. App. B, ¶ B-3a. The COMUSNAVEUR Force Civilian Personnel Director chairs JCPC-Italy.

(3) EUCOM's Civilian Personnel Advisor is a non-voting representative while the Exchanges are non-voting associate members. App B, ¶¶ B-3a, B-3b.

(4) Other DOD activities may attend meetings as observers as deemed appropriate by the JCPC. App. B ¶ B-3.c.

(5) JCPC may establish the following subcommittees. Each voting member will have a representative on the JCPC and representatives of the Exchanges will be invited to attend. App. B. ¶B-3d. For example, in Italy:

- Wage & Classification Subcommittee. JCPC-Italy established this subcommittee which is chaired by the Navy (Naples).

- Employment-Management Relations. JCPC-Italy established this subcommittee as Labor Relations and Employment Practices. It is chaired by the Army (SETAF).

- Employment and Personnel Systems. JCPC-Italy opted not to establish this subcommittee.

D. COMUSNAVEUR INST 5450.15F "Functions and Tasks of the

Commander, U.S. Naval Forces Europe (CNE) Force Civilian Personnel Director; Director, Civilian Personnel Programs; And Command Deputy Equal Employment Opportunity Officer" (CNE 016 July 21, 2003). The CNE Force Civilian Personnel Director:

1. Represents DON and COMUSNAVEUR on JCPCs and Chairs the JCPC for Greece, Spain, Italy, Iceland and UK. ¶ 5.e.

2. Conducts annual wage surveys in host-nations. ¶ 5f.

3. Coordinates with appropriate offices (e.g., U.S. Embassy Staffs, USEUCOM, ODC, US Sending State Offices), those host national issue that may result in a significant change in working conditions or pay, or have a significant budget impact, or may result in major or prolonged labor unrest. ¶ 5h.

E. **Host National Employee Travel**. The JTR applies to "DoD civilian officials/employees and their dependents, ***NOTE: This includes direct hire foreign citizens employed by DoD in OCONUS areas, except as restricted and limited by OCONUS commands or by agreements with the local government***" JTR C1001-A.2 (bold, italics in original), not including, "NAF officials and employees traveling on NAF business (unless adopted by the NAF activities)." JTR C1001-C.1 (parenthetical comment in original).

VII. HOST NATIONAL EMPLOYEES & U.S. CIVIL SERVICE ADMINISTRATIVE PROCEDURES.

A. **Host National Employees Cannot File EEO Complaints**. The EEOC complaint process "does not apply to … Aliens employed in positions, or who apply for positions, located outside the limits of the United States." 29 C.F.R. 1614.103(d)(4).

B. **Host National Employees Do Not Have MSPB Appeal Rights.** 5 U.S.C. 7511(b)(9), *referencing* 5102(c)(11) (excludes from the definition of employees with MSPB appeal rights, aliens or noncitizens of the United States who occupy positions outside the United States). Army hired appellant as a local national (LN) employee in Italy and she received an excepted service appointment. She later became a naturalized U.S. citizen and the Army converted her to GS status with an overseas limited appointment. When it was subsequently determined she was ordinarily resident in Italy at the time of her GS conversion, her appointment was terminated. She contested her initial conversion from LN to GS and her subsequent termination in an MSPB appeal. The MSPB determined that an

overseas limited appointment does not confer competitive status and it has no jurisdiction to hear the appeal of a non-preference eligible in the excepted service. *Meyers v. Army*, 35 M.S.P.R. 417, 419 (1987).

C. Host National Employees Do Not Have Recourse to the FLRA. An "alien or noncitizen of the United States who occupies a position outside the United State" is excluded from the definition of "employee" with respect to Chapter 71-Labor-Management Relations of the Civil Service Reform Act of 1978. 5 U.S.C. 7103(a)(2)(i). This removes labor management relations with foreign national employees from the Federal Labor Relations Authority (FLRA) and the federal civil service labor-management grievance/arbitration process. Limitations on the FLRA with respect to U.S. civil service labor relations are discussed at page 52.

VIII. ADMINISTRATIVE STRUCTURE FOR OVERSEAS EMPLOYMENT OF U.S. CIVIL SERVANTS.

A. DOD Policy For Overseas Civil Service Employment.

1. DOD Dir 1400.6 "DoD Civilian Employees In Overseas Areas" (ASD(MRA&L) Feb. 15, 1980). Establishes basic policy for overseas employment.

3. POLICY

3.1. " [E]ach Military Service commander shall employ a civilian manpower mix -- U.S. citizens and local nationals -- that blends financial prudence, conformance with host country agreements or treaties, availability of qualified local national personnel, and the desired low-key presence of the U.S. Government abroad."

3.2. "Unless precluded by treaties or other agreements that give preferential treatment to local nationals, preference shall be given to dependents of military and civilian personnel as provided in DoD Instruction 1400.23 (reference (d)). Personnel transferred from or recruited in the United States shall be limited to key personnel, those regarded as essential for security reasons, or those possessing skills that are not available locally."

3.3. "It is the policy of the Department of Defense to encourage its more capable employees in the Continental United States to accept overseas assignments as a part of their career development. In order to promote the efficiency of worldwide operations,

> employment of U.S. citizens in foreign areas shall generally be limited to 5 years, as provided in DoD Instruction 1404.8 ... Rights to return to a position in the Continental United States shall be given to DoD career and career-conditional employees who accept assignments overseas with the Department of Defense."
>
> 3.8. "The Department of Defense recognizes that to obtain and retain the services of DoD civilian employees of the caliber required in its overseas areas, it may be necessary to provide pay differentials and allowances over and above base salary. Therefore, within the provisions of applicable laws and regulations (DoD Instruction 1418.1, …, DoD civilian employees serving in overseas areas shall be granted differentials and allowances that are appropriate to their places of employment and their employment conditions."

2. To reduce the need to import U.S. civil servants into foreign countries, foreign nationals shall be employed as extensively as possible by the U.S. Forces consistent with any agreement with the host nation and DOD family member hiring policies. DOD 1400.25-M, "DOD Civilian Personnel Manual" SC 1231.4.1.2 (USD(P&R) December 1996).

B. Duration of Tour.

1. Minimum Tour. The minimum duration of overseas tours is driven by the statutory requirements for a government funded travel and transportation costs (e.g., the household goods move (HHG)). With respect to the agency paying travel and transportation expenses to return the employee from OCONUS, the employee must have served for a "minimum period" which will be "not less than one nor more than 3 years" to be established in advance by the person acting as "head of agency." 5 U.S.C. 5722(a)(2), (c)(2). Further, the DOD policy is that it "is neither cost-effective nor efficient to provide more than one PCS move to a DoD employee during any 12-month period." JTR C5005-C.

2. Standard Tours. "Standard tours of duty overseas are 36 months under initial, and 24 months under renewal, agreements negotiated with employees assigned OCONUS." JTR C4005-C.1.a. Exceptions to the standard tour are listed in JTR C Appendix Q. "[T]ours established by ASD(FM&P) for DoD civilian employees in OCONUS localities are uniform within each area." JTR C4005-C.1.a.

   a. There is an extensive discussion in JTR C4005 defining tours of duty, administrative extensions or reductions of tours, credit for prior

OCONUS service, reassignments in the same or different OCONUS area. The date a tour begins is defined in JTR C4006.

b. The authority to extend the tour beyond the first tour up to a total of 5 years is delegated to the heads of overseas activities. OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-4b.(1).

c. "A decision on whether or not to extend an assignment should be made no sooner than 6 nor no later than 3 months before the scheduled tour expiration date. Employees should be notified in writing of a decision to not extend an assignment and advised of return options available upon completion of the assignment ... Rotation will be accomplished through exercise of return rights, or if eligible, through the PPP." OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-5a.

d. Acceptable reasons for release from a period of service is covered in JTR C4009.

e. Financial penalties for failing to satisfy the Travel Agreement (TA) service requirement is covered in JTR C4352.

3. 5-Year Rule. It is the declared policy of Congress "to facilitate the interchange of civilian employees of the Defense Establishment between posts of duty in the United States and posts of duty outside the United States through the establishment and operation of programs for the rotation" of employees "consistent with" the mission and "sound principles of administration." 10 U.S.C. 1586(a). This statute constitutes the policy basis for the 5-year rule.

a. SECDEF is responsible for the program for DOD employees. The respective Secretary of each military department is responsible for the program for employees of that department. 10 U.S.C. 1586(b). Notwithstanding this provision, DOD generally exempts its employees from the 5-year rule, and DOD regulations, in effect, control the program for all military departments.

b. By its terms, the statute applies to career-conditional (generally employees who have served less than three years) or career employees (generally employees who have served over three years) in the competitive civil service. 10 U.S.C. 1586(b)(1). Thus, the 5-year rule does not apply to employees in the Excepted Service or non-appropriated fund positions, e.g., with the Exchange.

(1) DOD Instruction. The implementing instruction for the 5-year rule is the DOD Civilian Personnel Manual Subchapter 301.4 (1988). Under the 1988 version, local military commanders have the authority to grant extensions. Interim Guidance was issued by the DOD Deputy Assistant Secretary of Defense (Civilian Personnel Policy) relating that tour extensions should only be granted in extremely rare situations. Subchapter 301.4 has been pending revision and republication since at least 1997 as Subchapter 1230, "DOD Civilian Personnel Manual" 1400.25-M (USD(P&R) December 1996). As of January 2006, the revision had not been published as final.

c. Navy Instruction. OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-1.

(1) The following classes of employees are exempt from the 5-year rotation policy:

(a) Employees in the excepted service;

(b) Employees serving continuously in a foreign areas since before implementation of the 5-year rotation policy on June 1, 1988. (Note: the instruction later relates that employees who were employed in a foreign area on April 1, 1986, and who are not serving under an agreement providing for their return to the U.S., shall not be required to return against their wishes. *Id*., at ¶ 5-9 "Return Placement of Overseas Employees Through the Priority Placement Program.")

(c) Employees in overseas-unique positions. This applies to incumbents of positions "which require (i.e., almost daily contact with government officials of the host nation and a detailed current knowledge of the culture, mores, laws, customs or government processes of the host nation which cannot be acquired outside the host nation."

(i) Such contacts and knowledge must be the reason the position was established.

(ii) The PD must reflect such duties.

(d) Employees who are dependents of military or DOD civilian personnel sponsors stationed in the area. The length of the dependent's tour is tied to the sponsor's tour.

(e) SES employees.

OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-3.a, *referencing* the DOD Civilian Personnel Manual 301.

(2) These individuals "may upon approval and only at the end of the 5 years of foreign service forfeit any return rights and remain in the foreign area indefinitely". OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-3b, *referencing the* DOD Civilian Personnel Manual 301. Note: return rights are to their previous position back in the States - remaining over 5 years does not entail a forfeiture of the Transportation Agreement (TA).

(a) Major commands are delegated the authority to approve return rights forfeiture which may be further delegated. *Id*., at ¶ 5-3.b(1).

(b) Upon approval to forfeit return rights, employees will sign a new TA. *Id.*, at ¶ 5-3.b(2).

(c) The instruction does not address employees who do not have return rights.

(d) Navy Theater Instruction. The Navy's theater instruction on the subject is COMUSNAVEUR INST 12301.2F "Tour Rotation of U.S. Employees Overseas" (CNE 016 Jun 10, 2003).

(e) A challenge to the 5-year rule made by overseas employees was rejected by the D.C. District Court. *OCONUS Employee Rotation Action Group (ODERAG) v. Cohen*, 140 F.Supp.2d 37, 2001 W.L. 424920, 2001 U.S. Dist. LEXIS 8915 (D.D.C. March 27, 2001).

(f) History of Rule. The 5-year rule was initially established as a DOD program on April 1, 1966 and applied to newly hired employees and employees who transferred in after that date. The program did not apply to employees already serving in a foreign area who were serving without a TA. The program also provided that employees going overseas from the U.S. on a TA would get reemployment rights to their old position under Public Law 86-585. 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967).

4. Extension of Tour Beyond 5 Years. DON policy is that employees should serve their initial 5-year tour "and should plan their careers to return upon completion of their assignment. Tour extensions [beyond 5 years overseas] will be at the request of management with the concurrence of the employee." OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-1. The authority to grant extensions beyond 5 years is delegated to the Major Commands which may be redelegated. OCPM INST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶ 5-4b(2).

C. NATO SOFA - Membership in the U.S. Civilian Component. The basic definition of membership in the U.S. Civilian Component is in the NATO SOFA art I.1(b).

1. Definition Part 1: "'civilian component' means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party ..." NATO SOFA art I.1(b). In other words, the DOD U.S. civil service (including appropriated fund, non-appropriated fund, and Exchange employees) comprise the "U.S. civilian component." Host national employees under Article IX.4 of the NATO SOFA constitute the other category of civilian employment.

   a. "in the employ of an armed service," thus the SOFA does not apply to U.S. civil servants from other federal agencies in Italy, e.g., the U.S. Embassy staff.

   b. "accompanying the force." European nations tend to view this as an active part of the definition. This issue crops up when the U.S. Forces want to hire an American, who is not otherwise affiliated with the force and is already in the host nation, into the civilian component. Under the European view, a local U.S. hire shouldn't be a member of the civilian component because they weren't "accompanying the force" when they arrived in the host nation. This view is strengthened by SOFA article IX .4 which provides that "[l]ocal civilian labour requirements" will be satisfied by "local," i.e., host nation, civilian labor. The U.S. Forces view is that "accompanying the force" is an end-result; if the candidates meets all the other criteria (isn't a citizen of the host nation or ordinarily resident), they can be hired into the U.S. civilian component and thereby "accompany the force." Lazareff found the "requirement according to which the civilian must 'accompany a Force' [to be] too vague to represent a specific condition." Serge Lazareff, *Status of Military Forces Under Current International Law*, Second Part, Chapt. II §2.2 (1971).

2. Definition Part 2 - Those who are prohibited from membership in the U.S. civilian component:

   a. The following persons are prohibited from being a member of the U.S. civilian component in NATO SOFA art I.1(b):

      (1) "Nationals of" the host nation, e.g., Italian nationals, cannot be hired into U.S. positions in Italy,

      (2) Persons who are "ordinarily resident" in the host nation. For example, we cannot hire as U.S. employees, U.S. citizens who already ordinarily reside in Italy.

      (3) We cannot hire "nationals of any state which is not a party to the North-Atlantic Treaty." Typically, this restriction impacts Asian spouses of U.S. Forces personnel.

         (a) DECA and base commanders allow dependents who are citizens of non-NATO countries to be commissary baggers. The theory is that these individuals are not employees of the base; rather the CO has given them a "license" to bag groceries.

      (4) Nor can "stateless persons" be hired into the U.S. civilian component. This provision may seem an anachronism now, but as late as 1960, there were still 100,000 World War II refugees living in camps in Europe. R. Davies, "In Praise of Ronald Searle", *The Independent on Sunday - Talk of the Town* (U.K. Magazine), Sept. 21, 2003, at 20, col. 1.

         (a) These restrictions apply to appropriated fund and non-appropriated fund positions.

3. Issues Regarding the "Nationals of" Restriction. Poorly and somewhat inaccurately stated, "nationals of" a country is an expanded concept of citizenship - e.g., nationals of the United States would include citizens of Puerto Rico even though they are not U.S. citizens. *See Restatement (Third) of Foreign Relations*, §§211h, 212 (1986).

   a. According to the U.S. Immigration & Nationality Act:

      (1) "The term 'national' means a person owing a permanent allegiance to a state." 8 U.S.C. 1101(a)(21).

(2) "The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the united States, owes permanent allegiance to the United States." 8 U.S.C. 1101(a)(22).

(3) Non-citizen nationals are defined at birth. 8 U.S.C. 1408.

b. U.S. citizenship requirements, see below, would limit nationals of NATO countries (other than nationals of the host nation), to non-appropriated fund positions in the U.S. civilian component.

c. Dual National (DN) Employees. These are U.S. civil servants (appropriated and non-appropriated fund employees) who hold dual U.S. and host nation citizenship. By definition in the NATO SOFA, "nationals of" the host nation cannot be members of the U.S. civilian component. European nations generally regard dual national employees as ineligible for membership in the U.S. civilian component.

4. The Ordinarily Resident Restriction. There is no definition of "ordinarily resident" in the SOFA and typically, no bilateral definition either. The U.S. Forces use general U.S. concepts of domicile to determine if an applicant is ordinarily resident, e.g., in Italy the "Tri-Component Instruction" CINCUSNAVEURINST 5840.2D, USAEUR Reg 550-32, USAFE Inst 36-101, Section VI (April 4, 2001).

a. Criteria in the Tri-Component Instruction.

(1) An individual is ordinarily resident if he/she physically resides in Italy for more than one year without affiliation with the U.S. Forces. ¶21.b.

(2) A person who has lived in Italy for less than one year without affiliation with U.S. Forces can become ordinarily resident if the individual: ¶21.c.

- Has remained in Italy on a family cohesion permit to stay (*permesso di soggiorno per famiglia*).

- Registers as a *residente* in the Municipal Register (*Ufficio Anagrafe*) of the town where they reside;

- Takes affirmative steps to avail themselves of permanent resident benefits including, but not limited to, voting or registering to vote in Italy, applying for unemployment

benefits, obtaining a work booklet (*libretto di lavoro*), obtaining a *libretto sanitari*o for the Italian health care system, obtaining a work permit (*permesso di soggiorno per lavoro suborinato* or *permesso di soggiorno per lavoro autonomo*) unless the permit was issued for employment with the U.S. Forces in Italy, and paying or having a legal obligation to pay Italian income taxes or property taxes because of residency.

b. U.S. Income Tax Exclusion. In nearly all circumstances, the criteria for filing for Foreign Earned Income and Housing Exclusion - Deduction from U.S. income taxes would be the equivalent of stating the person is ordinarily resident in the host nation. *See* IRS Publication 54 "Tax Guide for U.S. Citizens and Resident Aliens Abroad."

c. CINCUSNAVEUR INST 12301.3B "Ineligibility of 'Ordinarily Resident' Individuals for U.S. Civilian Component Employment in NATO Host Nations" (CNE 016 Sept. 2, 1998).

d. CINCUSNAVEUR INST 12301.4 "Civilian Component Eligibility in Greece" (CNE 016 May 13, 1997).

5. Minimum Work Week Restrictions. In order to be a "regular" NAF employee the individual has to have a regular schedule of not less than 20 hours a week. DoD 1400.25-M, "DOD Civilian Personnel Manual" SC1403.3.1.1 (USD/P&R December 1996). This status is sometimes used as benchmark for membership in the U.S. civilian component (with attendant ID card privileges). E.g., CINCUSNAVEUR INST 12301.4 "Civilian Component Eligibility in Greece" ¶5a (CNE 016 May 13, 1997).

6. Reasons for the SOFA Restrictions. It is a matter of host nation sovereignty and taxes. Members of the U.S. civilian component are employees of the United States and pay taxes to the United States - not to the host nation. The European nations didn't want their citizens to escape taxation by being able to join the U.S. civilian component. Neither did they want Americans who were already residing in their country to be able to escape local taxes by joining the U.S. civilian component.

7. Required Documentation. Members of the civilian component must have the appropriate identifying documentation: if required by the host nation, an appropriate visa for entry into the country; a U.S. official (purple cover) or a "no fee" passport identifying the person as a member of the civilian component (regular blue "tourist" passport with the "SOFA

Stamp"), and, if required by the host nation, a permit to stay (i.e., a host nation "green card").

a. Military members, but not members of the civilian component or dependents, are exempt from passport and visa requirements. NATO SOFA, art. III.1. Visas are a permission to enter a country. Individuals already in a foreign country cannot get a visa to enter that country. Visas are typically available from the host nation's embassy or consulates.

8. Essential Personnel of the USO, Credit Unions, and Red Cross are typically treated as equivalent to members of the U.S. civilian component in bilateral agreements between the U.S. and the host nation. Technical representatives of U.S. Forces contractors are also typically addressed in bilateral agreements. Not all contractor personnel are entitled to "logistical support," i.e., ID card privileges, just the "tech reps," it is a term of art. The citizenship and residency restrictions that apply to members of the U.S. civilian component are also applied to essential personnel and tech reps.

D. U.S. Statutes Generally Affecting Overseas Employment of U.S. Civil Servants.

1. U.S. Citizenship Requirement for the Competitive Service. The requirement to be a U.S. citizen in order to be a U.S. civil servant in the competitive service is not required by statute but by Presidential Executive Order and implementing regulations. Executive Order (E.O.) 11935, dated September 2, 1976, provides that no person shall be admitted to competitive examination or given any appointment in the competitive service unless such person is a citizen or national of the United States. *Codified at* 5 C.F.R. 7.4.

a. An exception was created on January 18, 2001, by E.O. 13197 allowing OPM to "as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments." 5 C.F.R. § 7.3.

b. By way of contrast, only American citizens can be appointed to the Foreign Service except for consular agents or as a foreign national employee within the Foreign Service. 22 U.S.C. 3941(a).

2. Citizenship Requirements in the Non-Competitive Service. Non-

competitive service employees are concentrated in non-appropriated fund positions (e.g., Exchange and MWR operations). The "DOD Civilian Personnel Manual" subchapter dealing with Nonappropriated Fund Personnel Management generally allows the hiring of U.S. citizens, and non-U.S. citizens in the United States who are a bona fide residents and have proper documentation from INS to work in the U.S. DOD 1400.25-M, SC1403.4.2.3 (USD(P&R) December 1996).

a. As far as allowing bona fide residents with U.S. work permits to be employed in the U.S., DOD is following the Immigration Reform and Control Act of 1986 (IRCA), PL 99-603, November 6, 1986.

b. In discussing the hiring of non-citizens, the DOD Civilian Personnel Manual references the OPM Operating Manual discussion of the Federal Wage System (FWS, "blue collar" paid by the hour) for non-appropriated fund employment. Federal Wage System, Operating Manual, The Federal Wage System Subchapter S1. "Basic Authorities" ¶ S1-5 (OPM 1996 Update). The reference should not be understood to limit the hiring of foreign nationals in the U.S. to blue collar positions. Rather, OPM simply discussed the issue in their FWS Operating Manual and DOD referenced it. There is nothing in IRCA that limits foreign nationals in the U.S. to blue collar positions.

c. Note that citizens from non-NATO countries cannot be hired into the U.S. civilian component, even if they are dependents of military members or civilian employees, and even if the dependent has a U.S. work permit. This is because the NATO SOFA limits the visiting force, e.g., the U.S. Forces, civilian component to "nationals of any State which is not a Party to the North Atlantic Treaty ... ." NATO SOFA art I.1(b).

3. Limits on American Citizens Being Hired Host National Employees. See discussion at page 13.

4. Family Preference. A hiring preference is available for family members of government employees assigned abroad at their post of residence. "The fact that an applicant for employment ... is a family member of a Government employee assigned abroad shall be considered an affirmative factor in employing such person." 22 U.S.C. 3951(b). Although written for the Department of State, such programs may also be developed by other agencies with employment abroad. 22 U.S.C. 3968(b); DOD Inst 1400.23 (ASD(FM&P May 12, 1989) (DOD is presently rewriting regulations on this program to be published in the "DOD Civilian Personnel Manual" DOD 1400.25-M Subchapter 1232 (USD(P&R December 1996).) U.S. Forces operate a family preference in hiring for

appropriated and nonappropriated fund positions.

5. Military Spouse Preference. The following preferences are authorized for military spouses when the civilian position is located in the same geographic area where the military spouse is assigned.

   a. The Secretary of Defense is authorized to issue regulations to provide a hiring preference for military spouses for any DOD civilian position "if the [military] spouses is among persons determined to be best qualified for the position." 10 U.S.C. 1784(b)(2). Instructions on this provision are currently being rewritten for eventual publication in DOD Civilian Personnel Manual 1400.25-M Subchapter 315.

   b. The President is authorized to order a hiring preference for nonappropriated fund activity positions grades UA-8 and below and equivalent grades. 10 U.S.C. 1784(a)(2). The President subsequently issued Executive Order 12568, 51 Fed. Reg. 35497 (October 2, 1986), 10 U.S.C.A. 1784 note (West).

   c. The President can authorize positions outside the United States to be removed from the competitive service so that military spouses can be appointed to positions in the excepted service. 10 U.S.C. 1784(a)(1). It does not appear an Executive Order has been issued to effect this provision.

   d. Military spouse preference does not include a preference in hiring over an applicant with a veterans preference. 10 U.S.C. 1784(c). This does not preclude providing a military spouse preference where the military spouse also has veterans preference.

6. The "Rocky" Amendment - Authority to Hire Americans Residing Overseas Paid Under Local Compensation Plans. 22 U.S.C. 3951(a), (c)(1), *referencing* 3968.

   a. Hiring Authority. The Secretary of State is authorized to "appoint United States citizens ... hired for service at their post of residence for positions customarily filled by ... foreign national employees." 22 U.S.C. 3951(a). Other agencies have the authority to do the same. 22 U.S.C. 3968(b) ("any agency ... may administer employment programs ... for its employees who are ... United States citizens employed in the Service abroad who were hired while residing abroad ... in accordance with the applicable provisions of this chapter [52, 22 U.S.C. 3901 - 4226]."). DOD does not use this authority.

   b. Pay. Persons hired under the provision of 3951(a) "for service at their

post of residence shall be paid in accordance with local compensation plans established under section 3968 of this title." 22 U.S.C. 3951(c)(1). "The Secretary shall establish compensation (including position classification) plans for foreign national employees ... and United States citizens employed under section 3951(c)(1). To the extent consistent with the public interest, each compensation plan shall be based upon prevailing wage rates and compensation practices (including participation in local social security plans) for corresponding types of positions on the locality of employment, except that such compensation plans shall provide for payment of wages to United States citizens at a rate which is no less than the then applicable [American] minimum wage ... ." 22 U.S.C. 3968(a)(1).

(1) The provision suggests that separate compensation plans will be drawn up, one for foreign national employees the other for U.S. citizens hired overseas (which is how the State Department has implemented the hiring of American "Rocky's"), but does not mandate it.

c. Retirement Benefits. "... United States citizens employed under this section shall not be eligible ... for benefits under subchapter VIII of this chapter [Foreign Service Retirement and Disability" 22 U.S.C. 4021 - 4071k] or under chapters [sic] 83 or 84 of title 5 [civil service retirements]." 22 U.S.C. 3951(d). But, "Any compensation plan established under this section may include provision for ... payments by the Government and employees to ... a trust or other fund in a financial institution in order to finance future benefits for employees, including provision for retention in the fund of accumulated interest and dividends for the benefit of covered employees." 22 U.S.C. 3968(a)(1)(C)(i).

d. Interaction with NATO SOFA. As the NATO SOFA only contemplates two categories of civilian employment, members of the U.S. civilian component and local labor personnel, the SOFA would preclude establishing a separate local pay schedule for resident American citizens by the U.S. Forces in Europe. But, there is nothing in the "Rocky Amendment" or the SOFA that would preclude employment of Americans has HN employees.

e. Interaction of Title 22 & the Title 5 Classification Act. How the provisions of the Classification Act, which exempt "aliens or noncitizens" of the U.S. who occupy positions outside the United States from the GS pay schedule, 5 U.S.C. 5102(c)(11), interacts with the hiring of Americans into local overseas pay schedules is uncertain. Clearly, Congress considered Title 5 in passing the Title 22 "Rocky

Amendment," excluding employees so hired from an American civil service retirement - which would balance in favor of the Title 22 hiring authority being in addition to the hiring authority in Title 5 (and thus, the Title 5 provisions are not a restriction to the Title 22 hiring authority). But as mentioned above, DOD has not implemented any Title 22 hiring authority and limits local labor overseas compensation plans to "Foreign National Employees" defined as a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." DOD Manual 1416.8-M "Manual for Foreign National Compensation" ¶ DL1.1.4 (ASD(FM&P) January 1990).

E. Labor & Employee Rights Laws Overseas.

1. Laws Prohibiting Employment Discrimination. Individuals blocked from membership in the U.S. Civilian component by the SOFA's citizenship or residency requirements will typically challenge these requirements under one or more of the following laws.

   a. Title VII. National origin discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and the implementing EEOC regulations at 29 C.F.R. part 1614.

   b. Prohibition of Employment Discrimination Against US Citizens or Armed Forces Dependents. "Unless prohibited by treaty, no person shall be discriminated against ... in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term 'facility or installation' ... shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store." 5 U.S.C. 7201 note (Pub.L. 92-129, Title I, § 106 (Sept. 28, 1971)).

      (1) "Unless prohibited by treaty" exception takes care of almost all objections to hiring actions brought under this provision.

      (2) Note, we cannot hire dependents who are citizens of non-NATO countries into the US civilian component. NATO SOFA art I.1(b).

      (3) This law is not included in the list of statutes that the EEOC has jurisdiction over. 29 C.F.R. 1614.103. In order to raise a violation of this statute, a person would have to file an internal

agency grievance or a complaint with the U.S. Office of Special Counsel.

c. Veterans Preference in Hiring & the Uniformed Services and Reemployment Rights Act (USERRA). Former military members generally enjoy a preference in hiring into the U.S. civil service. 5 U.S.C. 2108, 3309. Further, USERRA prohibits employment discrimination against current or former members (or even those just thinking of going in the military) of the military or military reserves. 38 U.S.C. 4311. The typical allegation is that application of the ordinarily resident criteria in the SOFA violates these laws.

2. Why U.S. Discrimination Laws Don't Apply to the Citizenship & Residency Requirements For Membership In the U.S. Civilian Component Under the NATO SOFA.

a. International Agreements Take Precedence Over U.S. Domestic Law. Here the NATO SOFA is not just an international agreement but a formal treaty ratified by the Senate pursuant to Art. II, § 2, cl 2 of the Constitution. Accordingly, provisions of the NATO SOFA take precedence over Title VII, §6 of P.L. 92-129, veterans preference, and USERRA.

b. Claims of national origin discrimination are also inapplicable as the SOFA provides for employment distinctions on the basis of citizenship, and citizenship is not covered by the prohibition of national origin discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, or under the EEOC's regulations at 29 C.F.R. 1614.103(a).

c. The prohibition of employment discrimination by DOD against U.S. citizens does not apply where a treaty requires such distinctions. The provisions of §6 of P.L. 92-129 begins with the phrase, "Unless prohibited by treaty ... ." Noting the awkward wording and use of a double negative, the Supreme Court has suggested that "replacing the phrase 'unless prohibited by' with either the words 'unless permitted by' or 'unless provided by' would convey more precisely the meaning of the statute." *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982). Since the SOFA requires distinctions on citizenship, the section 6 prohibitions do not apply.

d. Allegations of violation of veterans preference or USERRA also fail because the individual has to be otherwise qualified for the position. If application of the SOFA citizenship or residency requirements make them unqualified for employment, then neither veterans

preference nor the provisions of USERRA apply.

3. Relevant Court & Administrative Decisions on U.S. Discrimination Laws.

   a. International agreements constitute an exemption to the provisions of domestic law. *Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510 (1982) (interpreting §6, P.L. 92-129, *codified at* 5 U.S.C. 7201 note). "Treaty," as used in §6, includes executive agreements and is not limited to those international agreements concluded by the president with the advice and consent to the Senate pursuant to Art II, § 2, cl. 2 of the Constitution.

   b. "Aliens are protected from illegal discrimination under [Title VII], but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86, 95 (1973). In *Espinoza*, the Court recognized that Congress required civil servants to be U.S. citizens (including the EEOC attorneys who prosecuted the case) and held that it was not national origin discrimination for a company to require its employees to be citizens. Accordingly, any EEO complaint alleging national origin discrimination for application of the citizenship requirements under the NATO SOFA should be dismissed for failure to state a claim pursuant to 29 C.F.R. 1614.107(a).

      (1) Farah made clothing at a plant in Texas. It had a policy against hiring Mexican citizens. Nevertheless, the workforce was over 90% Mexican-American (individuals with Mexican heritage or national origin, but not Mexican citizenship). Plaintiff was denied employment because of her Mexican citizenship and, with the support of the EEOC, she sued Farah alleging national origin discrimination in violation with Title VII.

      (2) Justice Marshall, who wrote the decision, recognized "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin," *id.*, at 92, and gave examples. But he concluded it "is equally clear ... that these principles lend no support to petitioners in this case." *Id*., at 92. Justice Marshall explained that there "is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin. It is conceded that Farah accepts employees of Mexican origin, provided the individual concerned has become an American citizen." *Id*., at 92-93. Justice Marshall concluded, the "plain

fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought. She was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship." *Espinoza v. Farah*, at 93.

c. EEOC Decisions. Complaints alleging discrimination in hiring due to the SOFA restrictions against hiring citizens of the host nation (by dual nationals) or those ordinarily resident (OR) in the host nation should be dismissed for failure to state a claim under Title VII. The EEOC should defer to the requirements of the treaty and with respect to "national origin complaints" recognize that allegations by dual nationals are really allegations concerning discrimination on the basis of citizenship, which as determined in *Espinoza v. Farah*, does not constitute national origin discrimination. In the 1980s the EEOC refused to allow agency's to dismiss such complaints as a finding on the merits. But the EEOC allowed dismissal of a complaint by an OR in the 1994 *Ashburn* decision. Whether the EEOC will sustain the dismissal of such complaints in the future will depend in large part on the quality of the information in the file on the SOFA.

(1) With respect to the allegations of discrimination for "national origin (American or host national)" by dual nationals, it is important that the agency correctly identify the allegation (as it is responsible for doing) as "citizenship." For example, "Robert Smith alleges he was discriminated against on the basis of his citizenship (host national) when he was not hired for the position of xyz." Then the allegation should be dismissed as alleging discrimination in a category not protected under Title VII. 29 C.F.R. 1614.107(a)(1) (fails to state a claim under 1614.103). In any appeal, the complainant can contest that the complaint should be defined as national origin discrimination - but all of the paperwork the agency submits to EEOC regarding the complaint should reflect that complainant wasn't hired because of complainant's host national citizenship.

d. The leading Equal Employment Opportunity Commission decision on dismissal of national origin discrimination complaint by a dual national relating to application of the NATO SOFA is *Ashburn v. West, Secretary of the Army*, 01932623 (EEOC 1994). The *Ashburn* decision dealt with the ability of a U.S. citizen, OR in Germany working as a German national, to contest his removal through the EEO complaint process.

(1) Mr. Ashburn, an American ordinarily resident in Berlin, had been employed as a local national when he was fired for refusal to obey an order regarding a duty assignment. Ashburn sued in German labor court and filed an EEO complaint. The Army dismissed the EEO complaint for failure to state a claim under Title VII.

(2) In its decisions sustaining the dismissal, the Commission recounted the provisions of the NATO SOFA and the treaty supplement applicable to Germany. "The treaties governing employment of non-military personnel by U.S. forces stationed in Germany," the Commission wrote, "distinguish between civilian personnel, who are subject to the laws of the country providing the armed forces (the 'sending state'), and local nationals, who are subject to the laws of the country in which the forces are located." *Ashburn v. West*. The Commission accurately related that, "Article I, ¶1(b) of the NATO SOFA treaty provides that those who are ordinarily resident in the receiving state cannot be employed as civilian personnel." *Ashburn v. West, citing* NATO SOFA, 4 U.S.T. at 1794.

(3) The Commission concluded its analysis of whether Mr. Ashburn stated a national origin claim by reviewing treaty provisions covering the working conditions for local nationals. The Commission concluded that Title VII did not apply to Mr. Ashburn's removal and sustained the dismissal of his EEO complaint.

e. In *Ashburn* the Commission abandoned the simple analysis found in *Cole v. Stone* and *Chambers v. Dept*. of the Air Force - that a contested personnel action involving the SOFA, accompanied by an allegation of national origin discrimination, necessarily stated a claim under Title VII. *Cole v. Stone, Secretary of the Army*, 05890142 (EEOC 1989); *Chambers v. Dept. of the Air Force*, 01832403 (EEOC/ORA 1984).

(1) Mr. Cole was denied employment as a U.S. civil servant in Germany because he ordinarily resided in Germany. The Army dismissed his EEO complaint. The Commission's analysis reversing the dismissal took less than two sentences. "[A]ppellant is alleging that he is an aggrieved applicant for employment in that he was denied a position with the agency and he alleges that he has been discriminated against on the basis of his national origin, American. This is all that is necessary for appellant to state a claim ... ."

(2) Similarly, Ms. Chambers was denied employment as a U.S. civil servant in Britain because she was a dual national. The Air Force dismissed her national origin (British) EEO complaint because the contested personnel action was taken on the basis of her citizenship. The Commission's Office of Review and Appeals reversed finding the agency's decision "improper" as a "finding on the merits of her allegations."

(3) In contrast, the Commission in *Ashburn* looked to the substance of complainant's allegation, not to make a decision on the merits, but to determine if Title VII covered the dispute. The 1994 decision in *Ashburn* presaged *Cobb v. Rubin* where the Commission held its Office of Federal Operations "erred when it held that the appellant's complaint stated a harassment claim without addressing whether the appellant's allegations where sufficient to state a hostile or abusive working environment." *Cobb v. Rubin, Secretary of Treasury*, 05970077 (EEOC 1997).

f. If the agency fails to dismiss the case, then if after the investigation the complainant requests a hearing on the merits, the agency should motion to have a decision on the record - such a motion was favorably considered in *Chung v. Rumsfeld , Secretary of Defense*, 01A20872, 103 LRP 17027 (EEOC/OFO April 17, 2003). Mr. Chung alleged multiple grounds of discrimination when he was not hired for positions in Korea over an eight year period because he was ordinarily resident there. The "Commission finds that grant of summary judgment was appropriate, as no genuine dispute of material fact exists. ... The agency has articulated legitimate, nondiscriminatory reasons explaining their various actions, i.e., that the United States -- Republic of Korea Status of Forces Agreement (SOFA) imposes restrictions on the hiring of U.S. citizens, like complainant, who have chosen to take up residence in Korea. Specifically, the SOFA excludes persons who are ordinarily resident in the Republic of Korea from being members of the civilian component."

Warning: A review of EEOC decisions involving SOFAs reveals that what the EEOC doesn't understand about SOFAs is scary. The fault however, lies not with the EEOC, but with the agency representatives who failed to educate the Commission.

g. Documents to Have in the File. Agency representatives must ensure that the EEO complaint file, as supplemented by their pleadings, contain copies of "the SOFA and implementing regulations and directions as well as other relevant documents setting forth either the

agency's policies or agreements with the host country regarding the employment of [host national] citizens. The investigation should also include any similarly situated employees who, as appellant alleges, are presently employed by the agency and have not renounced their [host national] citizenship. While the investigation here need not be extensive, it should adequately establish appellant's allegations and the agency's reasons for its action." *Chambers v. Air Force*, 01832403 (EEOC/ORA 1984). And, where necessary, the agency should supply host nation documents with translations. "Further, the party offering any documentary evidence in a language other than English should also submit an English translation of the same, along with a certification of the translation's accuracy under oath or affirmation." *Miller v. Widnall, Secretary of the Air Force*, 01964970, 1997 EEOPUB LEXIS 3128, at n. 6 (EEOC/OFO September 3, 1997). Otherwise, the EEOC will rely on complainant's assertions about the SOFA or, on EEOC's own reading of what they think the SOFA might mean - with predictable adverse results to the agency.

4. Restriction on FLRA Jurisdiction Overseas. Congress authorized the President to "issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security." 5 U.S.C. 7103 (b) (2). Executive Order 12391 partially suspends several labor-management relations provisions with respect to overseas activities of the Dept. of Defense. 5 U.S.C.A. 7103 note, 47 Fed. Reg. 50457 (Nov. 4, 1982).

   a. For United States citizen employees of the Department of Defense and Military Departments;

      - who are employed outside the United States;

      - for any matter **which substantially impairs** the implementation by the United States Forces of **any treaty or agreement**, including any minutes or understandings thereto, between the United States and the Government of the host nation;

   b. The Executive Order suspends:

      - FLRA's authorization to resolve issues relating to determining compelling need for agency rules or regulations, 5 U.S.C. 7105(a)(2)(D);

- FLRA's authorization to resolve issues relating to the duty to bargain in good faith, 5 U.S.C. 7105(a)(2)(E);

- FLRA's authorization to conduct hearings on unfair labor practice (ULP) complaints, 5 U.S.C. 7105(a)(2)(G);

- FLRA's authorization to resolve exceptions to arbitrator's awards, 5 U.S.C. 7105(a)(2)(H);

- the requirement to arbitrate grievances, 5 U.S.C. 7121(b)(3)(C) (since redesignated 7121(b)(1)(C));

- collective bargaining with respect to conditions of employment 5 U.S.C. 7102(2), 7114(a)(1), and the requirement to meet and negotiate in good faith, 7114(a)(4), and that it is a ULP to refuse to consult or negotiate in good faith 7116(a)(5);

- the ability of the union to appeal the to the FLRA when the agency refuses to negotiate under 7117(c).

c. And with regard to any union challenges to regulations governing the implementation by the United States Forces of any treaty or agreement, including any minutes or understandings thereto, between the United States and the Government of the host nations, the Executive Order suspends:

- the need to establish that there is a compelling need for the regulation, 5 U.S.C. 7117(b), and

- that it is a ULP for an agency to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement in effect before the date the rule or regulation was prescribed, 5 U.S.C. 7116(a)(7).

5. Tucker Act Jurisdiction, 28 U.S.C. 1491(a). When plaintiffs are unable to file EEO complaints, MSPB appeals or FLRA actions, they sometimes allege a contract action under the Tucker Act with the Federal Claims Court. The Tucker Act provides that the U.S. Court of Federal Claims has "jurisdiction to render judgment upon any claim against the United States founded ... upon any express or implied contract with the United States." 28 U.S.C. 1491(a)(1). The Tucker Act itself does not create a cause of action, it only provides jurisdiction when the plaintiff can point to an existing substantive right. *United States v. Testan*, 424 U.S. 392, 398 (1976). Thus the challenge Tucker plaintiffs face is finding a contract upon which they can base their claim.

a. The Civil Service Reform Act of 1978 (CSRA), Pub L. No. 95-454, 92 Stat. 111, revoked the Court of Claims jurisdiction over cases of federal employees alleging wrongful termination. With respect to grievances filed under a collective bargaining agreement (the union contract), the CSRA stated the grievance procedure would "be the exclusive procedure[ ] for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1982). In 1994 Congress amended the CSRA to state that the grievance procedure in the collective bargaining agreement would be the "exclusive **administrative** procedure[ ] for resolving grievances" thus removing a potential bar to the agency action being challenged in federal court. 5 U.S.C. 7121(a)(1) (1994) (emphasis added).

(1) With respect to actions filed in Claims Court, the 1994 amendment to the CSRA only applies to claims that have a statutory basis other than the CSRA. *Zaccardelli v. United States*, No. 00-512C (Cl. Ct. Oct. 27, 2005), *citing e.g., Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (allowed union member to pursue back pay claim under the Prevailing Wage Systems Act, 5 U.S.C. 5431-49 (2000), with Tucker Act jurisdiction), *O'Connor v. United States*, 308 F.3d 1233 (Fed Cir. 2002) (allowed union member to pursue overtime claim under the Fair Labor Standards Act, 29 U.S.C. 201-209 (2000), with Tucker Act jurisdiction), *Salinas v. United States*, 52 Fed. Cl 399, 401-02 (2003) (claim for money damages under the Back Pay Act, 5 U.S.C. 5596 (2000), with Tucker Act jurisdiction.

(2) On the other hand, alleging that the agency violated the collective bargaining agreement (CBA, the statutory basis for which is established by the CSRA), does not provide Tucker Act jurisdiction. "The CBA does not constitute an express or implied contract for employment with the Untied States for purposes of Tucker Act jurisdiction." *Zaccardelli v. United States*, 68 Fed. Cl. 426, 2005 U.S. Claims Lexis 327 (Oct. 27, 2005), *citing Adams v. United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004) (the terms of a federal employee's employment are "governed exclusively by statute, not contract.")

b. Tucker Act Inapplicable to NAFI's. The Federal Circuit has determined that the U.S. Court of Federal Claims does not have jurisdiction over claims against NAFIs. *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1365 (Fed. Cir. 2005) (where the court affirmed the principle that the Court of Federal Claims does not have jurisdiction under the Tucker Act to hear claims for breach of contract

against NAFIs. "[W]e have repeatedly held that the Tucker Act confers no jurisdiction over claims based on contracts made by NAFIs other than those contemplated in the 1970 amendments."); *AINS, Inc. v. United States*, 256 F.3d 1333, 1338-39 (Fed. Cir. 2004); *Core Concepts, Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003); *Zaccardelli v. United States*, 68 Fed. Cl. 426, 2005 U.S. Claims Lexis 327 (Oct. 27, 2005). MWR organizations have been determined to be NAFI's and thus not subject to suit under the Tucker Act before the Federal Claims Court. *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1292 (Fed. Cir. 2002); *Zaccardelli v. United States*, 68 Fed. Cl. 426, 2005 U.S. Claims Lexis 327 (Oct. 27, 2005).

c. Tucker Act is Applicable to the Exchanges. Although the Exchanges are NAFIs, the Court of Federal Claims has an explicit statutory exception to the "NAFI doctrine" to hear Tucker Act claims against the Exchanges. 28 U.S.C. 1491(a)(1); see, e.g., *AINS, Inc. v. United States*, 256 F.3d 1333 (Fed. Cir. 2004); *Zaccardelli v. United States*, 68 Fed. Cl. 426, 2005 U.S. Claims Lexis 327 at n.3 (Oct. 27, 2005). Of course, to be actionable under the Tucker Act, plaintiffs must point to an express or implied contract.

IX. DISCUSSION OF MEMBERSHIP IN THE U.S. CIVILIAN COMPONENT & EMPLOYMENT AS A HOST NATIONAL EMPLOYEE.

A. Issues: Who can be employed as a member of the U.S. civilian component and who can be employed as host national employee can become extraordinarily contentious and difficult.

- Can we hire into the U.S. civilian component members of the U.S. Forces who are retiring or otherwise leaving active duty?

- Individuals who are either dual nationals, i.e., have American and host nation citizenship, or American citizens who are ordinarily resident in the host nation question why they cannot be hired as a host national employee.

- Related issues occur with respect to current host national employees who acquire U.S. citizenship - does their continued employment create liability exposure from the employee who now has dual citizenship, or liability exposure for the U.S. Forces from others who want to be employed with the U.S. Forces?

- Can contractor employees or their dependents be hired into the U.S. civilian component or as host national (HN) employees?

- Can Americans legally in the host nation but not ordinarily resident, i.e., "tourist hires," be hired into the U.S. civilian component or as HN employees?

- Can HN spouses of U.S. military or civilian component members be employed as HN employees?

- Can a spouse from another NATO country who is married to a U.S. military member or a member of the U.S. civilian component be employed either in the U.S. civilian component or as a HN employee?

- What to do about individuals improperly hired into the U.S. civilian component because they have HN citizenship or were ordinarily resident (OR)?

- Dangers to the individual of being improperly hired into the U.S. Civilian Component.

B. **Criteria for Answer**: The answer to employment options under the NATO SOFA comes from a mixture of the SOFA provisions, any implementing bi-lateral agreements with the host nation, U.S. statutes, American regulations issued by OPM, DOD and the services, host nation immigration and host nation foreign national employment laws and regulations (which often implement EU requirements), labor agreements with host nation unions, whether the U.S. Forces are the direct or indirect employer, and from U.S. Forces employment policies in the particular country. It should be noted that the answer in one NATO country may be different than in another. For a discussion of how these issues have played out for the U.S. Forces in Germany, see Litak, Mike, "U.S. and Them: Citizenship Issues in Department of Defense Civilian Employment Overseas," *The Army Lawyer* (June 2005).

C. **The Variables**.

1. The SOFA & the U.S. Civilian Component. The NATO SOFA prohibits the following from being members of the U.S. civilian component:

    - Individuals who are "nationals of" the host nation. Note that the European nations typically include in this restriction, dual nationals, i.e., individuals who hold American citizenship and citizenship in the host nation.

- Individuals who are "ordinarily resident" in the host nation, for example, an American already ordinarily resident in the host nation cannot be a member of the U.S. civilian component.

- Individuals who are not nationals of a NATO country, for example, the Korean spouse of a military member assigned to a NATO country cannot be hired as a member of the U.S. civilian component.

2. Note that there is no requirement in the SOFA that members of the U.S. civilian component have to be American citizens; the only SOFA limitation is that the member of the civilian component be a national of a NATO country excluding a national of the host nation. It is American law that largely, but not completely, requires that the U.S. civil servants be American citizens.

3. The SOFA & Host National Employees. The NATO SOFA provides that, "Local civilian labour requirements of a force or civilian component shall be satisfied in the same way as the comparable requirements of the receiving State ... The conditions of employment and work ... shall be those laid down by the legislation of the receiving State. Such civilian workers employed by a force or civilian component shall not be regarded for any purpose as being members of that force or civilian component." NATO SOFA article IX ¶ 4.

   a. Note that while local civilian labor is typically filled by citizens of the host nation and are often referred to as local national (LN) or host national (HN) employees, the SOFA makes no mention of the nationality of the "local civilian labour." Thus, unless otherwise restricted by applicable American law, any individual the host nation determines is legally allowed to work in the host nation could be a member of the local civilian labor, e.g., a "third-country" national could be employed as an HN, or, at least as far as the SOFA is concerned, employing an American citizen as an HN is possible.

   b. Of course, anyone employed as an HN, including Americans, is, in accordance with the SOFA, going to be subject to host nation employment laws, pay, conditions of employment and host nation labor courts.

4. U.S. Statutes, Executive Orders & OPM Regulations.

   a. Executive Order - U.S. Citizenship Requirement. In order to be an American civil servant in the competitive service an Executive Order requires the person be a U.S. citizen. Executive Order (E.O.) 11935 (September 2, 1976) *codified at* 5 C.F.R. 7.4. Note that this

requirement only applies to the competitive service which excludes positions in the excepted service, e.g., doctors, lawyers, and excludes positions in non-appropriated fund organizations such as those typically found in the Exchange and MWR organizations.

b. Title 5 - the Classification Act has provisions that are generally accepted as affecting membership in the U.S. civilian component as well as local labor personnel. The Classification Act provides that all positions will belong to the General Schedule (GS), 5 U.S.C. 5101, unless there is a statutory exception provided section 5102. There are two statutory exceptions applicable here:

- The first exception is for non appropriated fund (NAF) positions. This provision makes no reference to whether the NAF positions are in the United States or overseas, and it is generally assumed that the exception applies to NAF world-wide.

- The second exception is §5102(c)(11) for "aliens or noncitizens" of the U.S. who occupy positions outside the United States, e.g., HNs. Note that this exception does not include American citizens who occupy positions outside the United States.

c. With respect to host national employment, the Classification Act only applies where the U.S. Forces are the employer of the HN, i.e., where we operate a direct hire host national employment program. The Classification Act does not apply where the host nation, typically the Ministry of Defense, is the legal employer and provides the services of the host national employees to the U.S. Forces.

d. Title 22 of the U.S. Code, which primarily deals with the Foreign Service, also allows other agencies to use the same provisions for their overseas employment programs. 22 U.S.C. 3968(b). One such provision is the "family preference," which although not cited in the DOD instructions providing for a family preference, is the statutory basis for the preference. DOD Inst 1400.23 (ASD(FM&P May 12, 1989).

e. Another provision of Title 22 allows federal agencies overseas to construct their own employment programs for U.S. citizens and host national employees. 22 U.S.C. 1951, 3968. This has not been implemented by DOD but provides an option to cover unanticipated employment situations.

f. The Interaction of Titles 5 & 22. The underlying policy in Title 5 (which speaks to competitive service positions and exempts foreign

nationals from GS positions outside the United States), is that American citizens will only be employed abroad in the American civilian component. Title 22 provides federal agencies greater flexibility in this regard and would allow the employment of U.S. citizens in special overseas employment categories - it is broad enough to include hiring Americans as HNs. How Title 22 provisions interact with the Classification Act provisions in Title 5 is not always clear and can depend upon the provision concerned. Consider, for example, should any overseas employment program comply both with Title 5 and Title 22 provisions, or do Title 22 provisions allow DOD the authority to create a separate overseas employment system that is not affected by the provisions in Title 5? Certainly, DOD integrated the family hiring preference into its Title 5 employment program but this use does not provide a definitive answer.

5. The Impact on DOD Instructions. A "Foreign National Employee" is defined as a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." DOD Manual 1416.8-M "Manual for Foreign National Compensation" ¶ DL1.1.4 (ASD(FM&P) January 1990).

6. The Impact of Host Nation Immigration Laws and Policies. Host nation immigration and employment laws can have a major impact on U.S. Forces employment options including the ability of U.S. Forces dependents to be employed as host national employees or as "foreign" labor in the host nation private sector, as well as on the ability of the U.S. Forces to hire American "tourist hires," i.e., Americans who are in Europe but not yet ordinarily resident.

   a. Host Nation Immigration Laws & The Entry Visa. The SOFA gives receiving States the option of requiring entry visas for members of the U.S. civilian component and the dependents of military and U.S. civilian personnel. A visa is the permit to enter the host nation and, consequently, can only be acquired outside the host nation.

   b. The Host Nation "Green Card." The host nation also provides American civilian employees and dependents of military and civilian employees an immigrant status document or passport stamp. The status of American civilian employees and dependents in the immigration system can be buffeted when the host nation does a major revision to their immigration employment system - the U.S. Forces are such a small sector to deal with it is often forgotten, leaving local immigration officials struggling with how to handle U.S. Forces civilian employees and dependents in a comprehensive

system that was not designed to include them. Considerations:

- Does their immigration status as a NATO U.S. civilian employee or as NATO dependent allow the individual to work in the civilian sector? Stated another way, if the civilian employee or dependent goes to work in the host nation private sector, have they jeopardized their status as a dependent or as a member of the U.S. civilian component under the SOFA?

- Consistent with their immigrant status, can dependents work for American companies under contract with the U.S. Forces at the installation?

- Consistent with their immigrant status, can dependents work for host-nation or third-country national companies under contract with the U.S. Forces at the installation?

7. Labor Agreements. Labor agreements between the U.S. Forces and host national unions may contain preferences for host nation or EU citizens for HN jobs.

D. Discussion - Not Answers.

1. U.S. Military Hired as Members of the Civilian Component? Can we hire into the U.S. civilian component members of the U.S. Forces who are retiring or otherwise leaving active duty in the country?

   a. It would seem the most natural of selections, the military member is legally in the country, former military make very attractive candidates and there is no PCS moving expenses. Of course, military members don't need a passport to be legally in the country, only an ID card, while as a member of the civilian component they will need to have an official government passport indicating that they are a member of the U.S. civilian component - but an official government passport can be acquired in-country. *See*, NATO SOFA article III, paragraphs 2(a), 3.

   b. Visa & HN Immigrant Status. This is where problems can occur.

      (1) Visa Requirement. Host nations (the receiving states) may require members of the civilian component to have visas under Article III of the NATO SOFA, and if the host nation won't grant a wavier to military members leaving the service, the

military member will have to leave the host nation and apply for a visa to reenter as a member of the civilian component.

(2) HN Immigrant Status. Typically, former military members want to remain in the country because they have married a host national citizen - if they register with the host nation immigration service for a permit to stay for family reasons that might make them ordinarily resident as far as the host nation is concerned. For example, American military personnel who discharge or retire and want to remain in Italy with their Italian family will typically get a "*per familia*" (for family reasons) permit to stay which also allows them to work in the private sector and thus, in the eyes of Italian officials, are ineligible for membership in the U.S. civilian component. Switching between immigrant status, e.g., from *familia* to *missione* is generally not allowed in Italy.

2. U.S. OR as HN. American citizens who are ordinarily resident (OR) in the host nation often question why they cannot be hired as a HN. Of course, it is the basic definition of civilian component that blocks an OR American from working in the U.S. civilian component. NATO SOFA Article I, ¶1(b).

   a. Whether an Ordinarily Resident American can be employed as a HN employee depends in the first instance on whether the U.S. Forces operate an indirect hire system - if host national employees are actually employed by the Ministry of Defense, then whether the OR American can work for the U.S. Forces depends solely on the host nation laws (whether the American citizen can legally work in the host nation) policies and union contracts - whether the MOD would consider an American applicant and whether either the MOD or the union contracts has a preference for citizens of EU countries. The American Classification Act only applies where the U.S. Forces are the legal employer - not where we are the indirect employer.

   b. Where the U.S. Forces operate a direct hire program (e.g., in Italy, Germany and for some positions in the UK), and where we control the hiring process (i.e., the local courts leave hiring to the discretion of the U.S. Forces), and the host nation immigration laws allow the applicant to work in the country, then the Classification Act will limit the OR American to NAF positions while a DOD instruction arguably prohibits hiring the American as a host national employee. Although Title 22 provides statutory authority to hire Americans resident overseas into local pay schedules, that authority has not been implemented by DOD.

(1) The Classification Act requires employees to be hired as GS unless there is an exception - the Classification Act does not provide an exception for Americans hired overseas, only for aliens hired outside the United States. The Classification Act does have an exception for NAF positions. The consequence of this is that it would be possible to employ U.S. citizens in any NAF position, including as HN personnel and not violate the Classification Act.

(a) Relying on this gap in the Classification Act to hire OR Americans as host national employees in NAF positions can result in subsequent problems however. The issues rise when the OR American wants to be employed in an HN appropriated fund (APF) position - to switch jobs, or for a promotion, or avoid termination during a RIF. If the U.S. Forces refuse to place the OR American in an APF position because of the Classification Act, it will be the host nation courts that will decide any appeals from the American host national employee. And as the host nation law will almost certainly see no distinction between APF and NAF funded positions, the host nation court will order the employee placed in a HN APF position, leaving the U.S. Forces with a situation that presumptively violates the Classification Act. Of course it could be argued that as a treaty, the requirements Article IX, paragraph 4, of the NATO SOFA which state that conditions of employment and conditions for the protection of workers shall be those established by the legislation of the receiving state, trump American domestic legislation and thus there is no violation of the Classification Act. But, there has been no authoritative opinion on this issue.

c. Impact of DOD Instruction. Certainly DOD does not contemplate hiring Americans as host national employees. The DOD Manual on overseas pay defines a "Foreign National Employee" as a "non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions." DOD Manual 1416.8-M "Manual for Foreign National Compensation" ¶ DL1.1.4 (ASD(FM&P) January 1990).

3. HNs Who Acquire U.S. Citizenship. What happens when a Host National employee working in an APF position acquires U.S. citizenship - does their continued employment violate the Classification Act, and does their continued employment create liability exposure for the U.S.

Forces from others who wish to gain employment with the U.S. Forces?

a. The employment of a HN employee, whether in an APF or NAF position, complies with both the SOFA and the Classification Act - if employed in a NAF position the Classification Act does not apply and if employed in an APF position, the Classification Act contains an exception. 5 U.S.C. 5102(c)(11) (covering "aliens or noncitizens" of the U.S).

b. Where HN employee is an APF position and acquires U.S. citizenship, what then? Arguably the HN employee is no longer an "alien[ ] or noncitizen[ ]" and having acquired U.S. citizenship must now be fired, or moved to a NAF position, to avoid violating the Classification Act. The problem is that if we take adverse action against the employee, any appeal would be to the host nation courts applying host nation law where the distinction between appropriated funds and nonappropriated funds does not exist and where the Classification Act, consistent with Article IX paragraph 4, will not be applied. Of course it could be argued that as a treaty, the requirements Article IX, paragraph 4, of the NATO SOFA which state that conditions of employment and conditions for the protection of workers shall be those established by the legislation of the receiving state, trump American domestic legislation and thus there is no violation of the Classification Act. But, there has been no authoritative opinion on this issue.

c. Liability Exposure. In Germany, OR Americans who couldn't get hired as members of the U.S. civilian component complained that as OR U.S. citizens they were no different than an "OR" German host national who had acquired American citizenship. Some argued, in effect, that agencies should ignore the Classification Act's application to them so that they cold be hired into APF LN jobs claiming their situation was no different that an APF LN employee who had acquired U.S. citizenship. This position found sympathy with a past director of the Army's former discrimination complaint investigation office. Litak, Mike, "U.S. and Them: Citizenship Issues in Department of Defense Civilian Employment Overseas," *The Army Lawyer* (June 2005). The U.S. applicant's assertion that "OR" Germans who acquire U.S. citizenship are no different than an OR U.S. citizens presents a false dilemma however. The actual issues involved are whether the U.S. Forces can legally hire a U.S. citizen who is OR in Germany consistent with the SOFA and Classification Act as opposed to whether the U.S. Forces can legally terminate a current German employee who acquires U.S. citizenship.

4. Tourist Hires. Can Americans legally in the host nation but not ordinarily resident, i.e., "tourist hires," be hired into the U.S. civilian component or as HN employees? Many of our European allies have taken the position that in order to be a member of the U.S. civilian component, the individual has to "accompany the force." *See* NATO SOFA Art I, ¶1(b). In other words, to give effect to the "accompany" language, the person has to be on orders from the States. The U.S. Forces have consistently rejected the European position with the view that as long as the person hired is a national of a NATO country, is not OR in the host nation and not a national of the host nation, then they can be hired into the civilian component and thereby accompany the force. "Accompanying the force" is a result, not a requirement.

    a. The next stumbling block is whether the local American hire (who is not OR or a citizen of the host nation), has the proper entry and immigration documents to work in the host nation. If the host nation requires a visa for members of the civilian component, as it is allowed to do under Article III of the SOFA, then the tourist hire would have to leave the country, get the visa, and return. Separate from the visa is whether they have the proper status, i.e., the proper "green card," in the country for being employed. In Italy for example, the two issues are intertwined. A "*per missione*" entry visa is needed to be a member of the civilian component. The visa is a prerequisite to receiving the *per missione* permit to remain in Italy as a member of the civilian component. As a result of these requirements, American tourists in Italy are ineligible to be hired by the U.S. Forces as members of the civilian component because they don't have any entry visa, or if they do, it is not the "*per missione*" visa.

5. Contractor Employees & Dependents As Applicants. Can contractor employees or their dependents be hired into the U.S. civilian component or as HN employees? This depends on their status in the host nation which is typically addressed in bilateral agreements between the U.S. Forces and the host nation as well as the host nation's visa and work status requirements. Whether they should be hired would also depend on the policy favoring the hiring of U.S. military spouses and the policy favoring the hiring of family members assigned overseas, versus the competing interests of hiring Americans in the local area and possibly the policy in favor of hiring veterans if the contractor or the contractor's spouse happen to have veterans status. Not to mention consideration of what happens if the contractor loses their job or contract.

    a. Generally it has been arranged that certain contractor personnel with special skills or knowledge are given quasi SOFA status and have

logistical support, i.e., ID card privileges, and are known at Technical Representatives or tech reps. Contractor personnel without this status would be subject to host nation employment laws and taxes.

b. Italy is an example of the complexities involved in whether to hire tech rep dependents as members of the civilian component. Tech rep dependents have the right visa and permit to stay - but these documents were not requested from the Italian government for membership in the civilian component. They don't have official passports - which could be remedied once they are hired - but then their visa is in their "tourist" passport and not their official passport. These are all issues to work out with the Italian authorities assuming the U.S. Forces decide to allow these individuals to apply for jobs.

6. Can HN Spouses Of U.S. Military Or Civilian Component Employees Be Employed As HN Employees? A lot depends on HN employment policies. The Spanish Ministry of Defense is extraordinarily strict - Spanish citizens who marry American military or members of the U.S. civilian component are forced to choose between having dependent ID card privileges versus being able to continue to work on the Spanish economy or as local labor personnel on base.

7. NATO Country Hires. Can an individual from another NATO country who is married to a U.S. military member or a member of the U.S. civilian component be employed either in the U.S. civilian component or as a HN employee?

   a. Definition. This issue is sometimes referred to as "third-country nationals" even though the phrase is used in other contexts as well. To avoid confusion, this outline uses "NATO-country nationals." As far as is known, the U.S. Forces are not hiring NATO-country nationals in Europe. The following is a discussion of what is possible under existing laws.

   b. Hiring As Host National Employees. Hiring NATO-country nationals as host national employees depends resolution of the following issues:

      (1) Host-National Hiring Preferences. Some host-national union contracts, known as the Conditions of Employment (COE) in Italy, have a preference for hiring host-national citizens as host national employees. Such preferences are inconsistent with EU Regulation 1612/1968.

      (2) Overlap Between NATO Countries and EU. The EU prohibits

hiring discrimination by member nations against the citizens of other member nations. EU Reg. 1612/1968. But not all NATO countries are members of the EU, e.g., Canada. So there is no EU prohibition against discriminating against Canadian citizens in hiring.

(3) Direct Hire v. Indirect Hire Countries. Where the host-national employees who work for the U.S. Forces are legally employed by the host nation Ministry of Defense, the host nation MOD may have citizenship hiring prohibitions or preferences.

c. Hired As Part of U.S. Civilian Component.

(1) U.S. citizenship is required for hiring into the competitive service so realistically, this limits the discussion to positions with the Exchange or MWR, i.e., to non-appropriated fund positions.

(2) The NATO SOFA restrictions on the U.S. civilian component would limit consideration to dependents who have citizenship in other NATO countries (not including citizenship in the receiving state). NATO SOFA art. I.1(b).

(3) Neither the military spouse preference in hiring at 10 U.S.C. 1784(b)(2), nor the family preference at 22 U.S.C. 3951(b), require that the spouse or family member be a U.S. citizen in order for the preference to apply. In other words, a Canadian spouse could qualify for a military spouse preference or a family member preference.

8. Improper Hires. What to do about individuals improperly hired into the U.S. civilian component because they have HN citizenship or are ordinarily resident?

a. European host nation courts have taken a consistent view that a person improperly hired into the U.S. civilian component, and so employed for several years, should be treated as a host national employee. This means that not only would a termination under U.S. procedures be ineffective, the employee likely needs to have his pay recomputed as a host national employee, or at the very least, the U.S. Forces now owe social contributions to the host national social security/retirement system.

b. The Merit Systems Protection Board will normally find they do not have jurisdiction to hear the cases of improperly hired employees.

Meyers v. Army, 35 MSPR 417 (1987); *Daneshpayeh v. Air Force*, 57 MSPR 672 (MSPB 1993), *aff'd* 17 F.3d 1444 (Fed. Cir. 1994) (MSPB's deference to the agency's regulations defining "ordinarily resident" is particularly noteworthy).

c. Particularly for longer term improperly hired employees, the best course is to fire them in a manner consistent with American and host national termination procedures. Termination procedures typically work on a notice and opportunity to respond before a final decision - complying with both systems shouldn't be overly difficult. That way the agency is procedurally covered whether the employee appeals to the MSPB, sues in a host nation court, or both.

d. Liability Exposure for Improperly Hired Employees. Individuals who want us to waive or shade the rules so that they can be hired as members of the civilian component (and Congressmen who write on their behalf) rarely appreciate the liability exposure an improper hiring has for the individuals themselves - they do not understand we are acting for the persons' own protection as well. If persons improperly hired into the civilian component are really host national employees - accordingly the NATO SOFA Article X paragraph 2, tax exempt status for members of the civilian component no longer applies. Further, the individual has been failing to pay import duty on items purchased at the Exchange and Commissary (and usually the fuel coupon records are accurate and well maintained) - and so the improperly hired employee now owes income taxes and import duties to the host nation and is subject to possible criminal and civil prosecution for not having done so. This is not a theoretical concern - the Italian prosecution of the "Darby Dozen," actually over 20 dual national employees at Camp Darby in the late 1990s, is an example.

9. Dependents Working on the Economy. This depends on the host nation rules. In Italy, for example, members of the U.S. civilian component and all dependents received "*per missione*" (for the NATO mission) permits to remain in Italy. This does not allow the individual to be employed in the Italian private sector. Work permits, "*per lavorare*" (for work), are, in the Italian system, inconsistent with membership in the U.S. civilian component - holding a "*per lavoro*" permit makes the individual ordinarily resident in the view of the Italian immigration system and government. In Germany however, there is no inconsistency between being a member of the U.S. civilian component and working on the private sector.

a. Note that employment outside the U.S. civilian component is subject

to host nation taxes. NATO SOFA Art. X.

X. OVERSEAS PAY, ALLOWANCES FOR AMERICAN CIVIL SERVICE EMPLOYEES - GENERAL.

A. Introduction.

1. The general context of this portion of the outline is assignments to Europe by American civil servants. This outline:

   - Is focused on DOD employees with less emphasis on particular coverage of spouses or other dependents. The outline does not cover SES. Nor overseas teachers, such as Department of Defense Dependent Schools (DODDS) employees, who have major variations from the rules due to the school year, and in particular, from travel rules applicable to other employees.

   - Is focused on DOD employees serving Foreign Outside the Continental United States (F-OCONUS) tours, not on non-foreign OCONUS (NF-OCONUS) tours in places such as Hawaii, Alaska or Puerto Rico. Tours in NF-OCONUS areas have different rules.

   - Is focused on Permanent Change of Station (PCS) moves not temporary change of station (TCS) moves or TAD/TDYs to a F-OCONUS location.

   - Neither addresses married civil service couples where each spouse has entitlements nor assignments of married couples where one is in civil service and the other military.

2. The outline does not discuss all rules applicable to payment of travel, per diem and relocation expenses - only as those rules are affected by overseas assignments.

Warning: This portion outline is a guide to overseas allowances - don't mistake it for the definitive word on overseas allowances. The regulations, especially the Joint Travel Regulation Volume 2 (JTR), are subject to change, so it is vital that the actual regulations be consulted. Further, when reading the regulations, the words used are pregnant with meaning that may not be readily apparent. Understand also that HR offices interpreting the instructions may read them differently than described here, or may have imposed additional requirements. So be sure to consult with the office that will actually be involved in an allowance determination to understand what all the requirements are.

3. This portion of the outline structure is generally organized for how an

employee would progress through an overseas assignment - the move overseas, overseas allowances, home leave, renewal agreement travel, the return from overseas, and concludes with emergency situations.

4. The outline uses the term "American civil servant" to distinguish from employees who are citizens of the overseas host country working for the U.S. Forces.

5. The statutes and regulations make a variety of distinctions between the: continental United States (CONUS) and outside the continental United States (OCONUS); the United States and the United States its possessions and territories; and foreign areas and non-foreign OCONUS areas. I have attempted to maintain those distinctions in the outline. "Overseas" is a generic term used in the outline meaning a foreign location.

6. A summary of authorized Travel & Transportation Allowances is at 41 C.F.R. Subchapter B "Relocation Allowances" Part 302-3 "Relocation Allowance by Specific Type."

7. A summary of authorized OCONUS allowances is at JTR C5010.

8. Note that although this discussion of the JTR is limited to "American civil servants" the JTR states that it applies to direct hire "foreign citizens employed by DoD in OCONUS" except as restricted by agreement with local governments and not including NAF employees. JTR C1001-A.2, C.1.

B. <u>General Observations on Allowances</u>.

1. The travel regulations can be viewed as divided into three parts - the underlying rules, the rules that have been added because of mindless application of the first set of rules by payment or travel officials to deny legitimate claims, and the rules that have been added because of extraordinarily greedy claims filed by employees.

The West Wing on Travel Regulations, Episode: 100,000 Airplanes

Donna: How many words are in the Gettysburg address?
Toby: 266.
Donna: And the 10 Commandments?
Toby: 173.
Donna: So you really wouldn't think you would need 6,000 to discover how a plane ticked gets reimbursed.
Toby: No.

Donna: No.

2. The regulations for overseas allowances are not particularly well written or integrated with one another. What particular phrases mean is often obscure and can change from instruction to instruction. For example, "a bona fide actual residence" with regard to a Transportation Agreement for overseas hires under JTR C4002-B.2.b(2), means your legal domicile or home of record, while "actual place of residence" with regard to the Living Quarters Allowance (LQA) for overseas hires under the Department of State Standardized Regulations (DSSR) § 031.12.a, means the residence as in where the person is actually living. Also, the policy goals behind some of the restrictions are often obscure, e.g., an employee overseas at permanent duty station (PDS) #1 without LQA, applying for a position at PDS #2, cannot get LQA even though an applicant from CONUS could.

3. It is important for managers and employees to know and understand the allowances and limits on the allowances before a move. "Fixing" problems after the fact is often impossible. Accordingly, proceeding on the basis that common sense and "saving the government money" will get the overseas candidate their allowances is bound to end in disappointment. Selecting officials need a firm opinion from HRO on whether the candidate will qualify for the allowance in question before making the job offer. Determining when the LQA and a TA is authorized for an overseas hire is complex, involving a confusing interaction of DOD instructions, the Joint Travel Regulations, and the Department of State Standardized Regulations (DSSR).

    a. For example, where the applicable regulations provided that transport of a POV required advance approval, and the employee did not get advance approval for shipping the POV on his travel orders, permission for shipping the POV could not be done retroactively. B-163364, 1968 U.S. Comp. Gen. Lexis 2420 (June 27, 1968) (interpreting Bureau of the Budget Circular No. A-56, rev. October 12, 1966).

4. "Saving the government money" is not a guiding principle of the instructions. The travel rules generally flow from fiscal law which firsts asks, "What is the authority for spending the money?" Without authority (and often advanced permission) to incur the expense, it is impossible to have the expense reimbursed later. The Navy tradition of acting first (incurring the move or the expense) and asking forgiveness (and reimbursement) for a resulting mistake does not work in this arena. The JTR states, "A traveler must exercise the same care and regard for incurring expenses to be paid by the Government as would a prudent

person traveling at personal expense." JTR C1058-1. The problem with following this rule for the employee is that it is only applied to the advantage of the government - and rarely, if ever, will this provision overcome a more expensive requirement specified in JTR.

5. The statutes, and especially the regulations, are geared toward a standard set of circumstances, namely, a civil servant in CONUS being hired for an overseas position and then returning to CONUS with dependents traveling with the civil servant. Deviations from that model can reduce the availability of one or more allowances.

Warning: In other words, if the person selected for an overseas position is not a current civil servant coming from CONUS, the gaining supervisor should check with the servicing personnel office to make sure what allowances are payable.

6. The major allowances/benefits for overseas employees are:

   a. Transportation Agreement (TA) where the government agrees to provide transportation for the employee, the employee's family, and their household goods to their overseas duty location and back. The TA is controlled by JTR Chapter C4000 Parts A & H.

   b. The Foreign Transfer Allowance (FTA) for temporary quarters in the United States prior to departure and miscellaneous expenses. 5 U.S.C. 5924(2)(A), 5724a(f); JTR C1004, C5352-B; DSSR § 240.

   c. Temporary Quarters Subsistence Allowance (TQSA) for temporary quarters occupied after first arrival at a PDS in a foreign area or immediately preceding final departure from that PDS. TQSA rules are in DSSR § 120.

   d. Living Quarters Allowance (LQA) where the government provides a quarters allowance. The LQA is controlled by provisions in the DOD Civilian Personnel Manual, DOD 1400.25-M, Subchapter 1250-E, and DSSR § 031.1.

   e. Post Allowance for those overseas locations with a living cost in excess of Washington, D.C. 5 U.S.C. 5924(1), 5941; DOD 1400.25-M "CPM" SC1250.5.1.2 (Dec. 1969); DSSR § 220.

   f. Schooling for Dependents.

7. Qualifying for an overseas Post Allowance is almost automatic. But for overseas hires, qualifying for a Housing Allowance is difficult, getting a Transportation Agreement is harder still, especially for dependents, and

oddly, especially hard for military spouses to be hired in the same country where their sponsor was stationed.

8. LQA and TQSA allowances "are designed to cover substantially all average allowable costs for suitable, adequate quarters, including utilities. They are not intended to reimburse 100 percent of all of an employee's quarters costs or to provide ostentatious housing or extravagant meals." DOD 1400.25-M SC 1250.4.5.

9. Authority To Make Determinations.

   a. Unless otherwise specified, where the DOD CPM provides for a "Head-of-Agency" decision, that authority has been delegated to the Director, [DOD] Civilian Personnel Management Services (CPMS), who may redelegate the authority as necessary. DOD 1400.25-M "DOD CPM" SC 1250.6.1.3.

   b. "Individuals authorized to grant overseas allowances and differentials shall consider the recruitment need, along with the expense the activity or employing agency will incur, prior to approval." DOD 1400.25-M "DOD CPM" SC 1250.4.2.

   c. Travelers who are given the wrong information by their agency bear the consequences. There is no concept of "detrimental reliance" from either the GAO or GSBCA. *See, e.g.*, *Albert Carter*, GSBCA 15435-RELO, 2001 GSBCA LEXIS 77, at 9 (April 9, 2001) ("It is certainly regrettable if Mr. Carter received faulty advice from a DoD employee, but such advice does not authorize an expenditure of public funds that is contrary to the regulations.").

C. **Applicability of Instructions**.

1. The JTR Applies to:

   a. DOD civilian employees and their dependents. JTR C1001-A.2.

   b. Direct hire foreign citizens employed by DoD in OCONUS areas, except as restricted and limited by OCONUS commands or by agreements with the local government. JTR C1001-A.2.

   c. DOD personal services contract employees. JTR C1001-A.2, *citing see* 27 Comp. Gen. 695 (1948).

   d. Military Sealift Command civilian marine personnel to the extent

provided in Civilian Marine Personnel Instruction 4650 (Navy). JTR C1001-A.3.

2. Nonappropriated Fund (NAF) Personnel are subject to the NAF Personnel Manual, BUPERSINST 5300.10A, Subj: Bureau of Naval Personnel Nonappropriated Fund (NAF) Personnel Manual For Navy Nonappropriated Fund Instrumentalities (NAFIS) (BUPERS-653 27 May 2003). The JTR does not apply to NAF personnel. JTR C.1001-C.1.

3. The JTR does not apply to contractors' representatives and contractor employees under contracts with DoD. JTR C.1001-C.2.

XI. OVERSEAS PAY & HEALTH CARE.

A. **Base Pay** overseas is without locality pay, that is, it is not on the "Rest of U.S." pay chart. This absence is somewhat counterbalanced by the housing allowance (LQA). This means however:

- Lower annual pay raises for civil servants overseas, for example, when CONUS employees might average a 3.5% pay raise, OCONUS employees could expect a 2.5% pay raise.

- Depresses retirement pay for those who retire in an overseas area. State-side locality pay is computed as part of the "high-three" while overseas housing and other allowances are not.

B. **Special Overseas Pay Scales Are Not Used**. Each agency could establish compensation plans for U.S. citizens hired overseas including family members of U.S. employees assigned abroad. 22 U.S.C. 3968(a)(1). The U.S. Forces in Europe have not done so, e.g., local American hires for appropriated fund positions in Europe are paid according to established GS pay scales.

C. **Health Care**. The Secretary of Defense may provide civilian employees, and members of their families, abroad with health care benefits comparable to benefits provided by the Secretary of State to members of the Foreign Service and their families abroad. 10 U.S.C. 1599b.

XII. **RECRUITING FOR OVERSEAS POSITIONS**. The following benefits are generally used to recruit candidates for overseas positions.

A. **Pay Retention (aka, Retain Pay, Save Pay) and Filling Overseas Positions**. Pay retention is much more an issue for overseas positions than positions in CONUS. The reasons for this are unclear, probably a combination of a tendency to keep high grade positions overseas to a minimum, and a desire to attract more experienced, i.e., higher graded, applicants for work in a complex overseas environment. If an activity wants to attract higher graded applicants from CONUS for an OCONUS position, e.g., have GS-14s interested in a GS-13 position, the activity can offer "pay retention" to the successful applicant.

1. **Pay retention is only available when all potential applicants have been informed in writing that it will be offered to successful applicants whose pay would otherwise be reduced if selected for the position. Written vacancy notices must state that pay retention is available**. OCPMINST 12536.1 (Supplement to FPM 990-2), Subchapt S3, *and the enclosed* Memorandum from DASD(CPP), "Subj: Grade and Pay Retention" ¶b(10) (Feb 13, 1987).

2. Determination Authority. Normally, "Heads of overseas activities or their designees are delegated authority to determine the positions to which pay retention will be extended as a recruitment incentive ... ." OCPMINST 12536.1 (Supplement to FPM 990-2), Subchapt S3.

   a. "In other circumstances, as determined by addressees [ASN(M&RA) for the Navy], resulting from personnel actions initiated by management to further the agency's mission, [pay retention may be granted] to the extend that the intent of the law and regulations governing grade and pay retention is met." Memorandum from DASD(CPP), "Subj: Grade and Pay Retention" ¶(b)11 (Feb 13, 1987), *reprinted in* OCPMINST 12536.1 (Supplement to FPM 990-2).

3. Attributes of Pay Retention.

   a. An employee is entitled to the lowest rate of basic pay in the position to be occupied which equals or exceeds his or her rate of basic pay immediately prior to the eligibility for retain pay or movement to the position. If the rate of basic pay is within the pay range of the lower grade, then pay retention dos not apply. 5 C.F.R. 536.205(b)(2).

   b. If the employee's rate of basic pay exceeds the maximum rate of the lower graded position, the employee is entitled to the lower of the rate

of pay the employee was receiving or 150% of the maximum rate of pay payable for the new grade. 5 C.F.R. 536.205(b)(3).

c. If an employee moves to another position at the same grade while entitled to pay retention, the employee's rate of basic pay after movement may not be less than the maximum rate of basic pay for the newly applicable rate range. 5 C.F.R. 536.205(b)(4).

4. Pay Retention & Reduced Annual Pay Increases. The employee under pay retention is entitled to 50% of the amount of the increase in the maximum rate of basic pay payable for the grade of the employee's current position. 5 C.F.R. 536.205(c). When the maximum scheduled rate of pay for the position becomes equal to or grater than the employee's retained pay, pay retention stops and the employee then receives the full increases in the maximum rate of basic pay. 5 C.F.R. 536.205(d).

5. Loss of Pay Retention. An employee loses entitlement to pay retention when:

a. The employee has a break in service of one day or more. 5 C.F.R. 536.209(a)(1).

b. The employee declines a reasonable offer of a position with a rate of basic pay equal to or greater than the rate to which the employee is entitled under pay retention. 5 C.F.R. 536.209(a)(2). A reasonable offer is defined at 5 C.F.R. 536.206, and among other criteria, the offer must be in writing, must inform the employee that pay retention will stop, and it need not be in the same agency.

c. The employee is demoted for cause or at the employee's request. 5 C.F.R. 536.209(a)(3).

d. For a discussion of what the employees grade and step will be upon return from an overseas assignment, see the discussion at 208.

B. Reimbursement for Expenses Relating Sale & Purchase of Residence.

1. Under 5 U.S.C. 5724a(d)(2), where an employee has transferred from a post of duty in the United States to a foreign duty location, reimbursement for the expenses related to the sale of the United States residence (or settlement of an unexpired lease) and purchase of a new residence upon return to the United States, is limited to:

- A sale of the residence incident to the return of the employee from the foreign duty location;

- The new State-side duty location is NOT the duty location the employee originally left from to go to the foreign duty location;

- The transfer from the foreign duty location to the United States is in the interest of the Government; and

- The employee sold the old residence or purchased the new residence AFTER the official notification of the employee's reassignment to the United States. 5 U.S.C. 5724a(d)(3).

2. By way of comparison, for a State-side to State-side reassignment, reimbursement is authorized at the time of the initial transfer. The delay in reimbursement for overseas assignments is based on the expectation that the employee transferred to a post overseas will retain his United States residence during his tour abroad, so that if he is again assigned to duty in the same commuting area, he will be able to live there. The absence of return rights simply means that the employee is not guaranteed reassignment to a particular place rather than meaning that he is precluded from being sent there. *Mark H. Swenson*, 15504-RELO (GSBCA April 18, 2001).

   a. As it is expected an employee assigned overseas will retain residence in anticipation of return to the same permanent duty station, the employee qualifies for reimbursement of real estate expenses only when the employee is officially notified at the close of his overseas tour that he will be returning to a different non-foreign duty station. *Edward J. Nanartowich*, 15237-RELO (GSBCA Feb 2, 2001); *Robert J. Wright*, 15399-RELO (GSBCA Mar 7, 2001); *John W. Gray*, 15484-RELO (GSBCA Mar 7, 2001); *David B. Nelson*, 15609-RELO (GSBCA Aug 8, 2001).

   b. Employee who transferred from Alaska to overseas duty location in the interest of the government was entitled to reimbursement for expenses when he sold his residence in Alaska after being told by agency officials he would not return to Alaska but instead he would be returned to his prior duty station in Georgia - which was then relocated to South Carolina. *Robert M. Hooks*, 72 Comp. Gen. 130 (1993).

   c. Employee who transferred from Hawaii to Korea, and sold his residence in Hawaii, was entitled to reimbursement for real estate expenses because employee had been notified that he would not be

returning to Hawaii, agency regulations precluded his return to Hawaii, and the employee returned from overseas to another duty station in the United States. *Timothy S. Haymend*, Comp. Gen. B-255822 (May 17, 1994).

3. Foreign Real Estate Costs. Neither statute nor regulation make any provision for reimbursement of expenses incurred by employee in settling unexpired lease at foreign location where the individual is stationed. *George Span*, 13728-RELO (GSBCA Feb 28, 1997).

C. Statutes Specifically Referring to Recruiting Incentives for an Overseas Assignment. Two statutes specifically refer to particular allowances as a recruiting incentive.

1. Allowances Based on Living Costs and Conditions of Environment. May be paid for conditions of environment which differ substantially from the continental United States and warrant an allowance as a recruitment incentive. 5 U.S.C. 5941(a)(2). May not exceed 25 percent of the rate of basic pay. 5 U.S.C. 5941(a). This allowance is not available to employees entitled, under 5 U.S.C. 5924, to a cost-of-living allowance. 5 U.S.C. 5941(b).

2. Pay Post Differential For Especially Adverse Conditions. An additional Incentive of up to 15% above the normal 25% limit on a post allowance, is allowed "for an assignment to a post determined to have especially adverse conditions of environment." 5 U.S.C. 5925(b).

D. DOD Policy on Overseas Recruitment. The DOD Policy relates that all overseas allowances and differentials (except the post allowance) "are specifically intended to be recruitment incentives for U.S. citizen civilian employees living in the United States to accept Federal employment in a foreign area. If a person is already living in the foreign area, that inducement is normally unnecessary." DOD 1400-25-M SC 1250.4.1, *referencing* DOD Dir 1400.25. That the allowances and differentials are to be used as an incentive is reinforced by the DOD policy that, "Individuals shall not automatically be granted these benefits simply because they meet eligibility requirements." DOD 1400-25-M SC 1250.4.3. Nevertheless, individuals who are authorized to grant overseas allowances may do so for overseas hires but they "shall consider the recruitment need, along with the expense the activity ... will incur, prior to approval." *Id.*, at SC 1250.4.2.

XIII. SUMMARY OF ALLOWANCES FOR MOVE TO & AT THE FOCONUS PDS.

A. Summary of Statutory Provisions Involving a PCS Move. Three different statutes are in play to cover a PCS move, 5 U.S.C. 5724(a), 5724a, 5924(2), plus section 5722 for new employees.

1. PCS Travel expenses for the employee are authorized by 5 U.S.C. 5724(a)(1).

2. PCS Transport expenses for the dependents are authorized by 5 U.S.C. 5724(a)(1). The authorization for transport expenses is supplemented by an authorization for a per diem allowance or actual subsistence expenses while en route by 5 U.S.C. 5724a(a).

Note:The distinction between "travel expenses" and "transport expenses" is that "travel expenses" include not just the tickets but per diem as well, while "transportation expenses" are limited to the cost of actual transport itself (e.g., the air fare).

3. The cost of moving the household goods, up to a maximum of 18,000 pounds, is authorized by 5 U.S.C. 5724(a)(2).

4. The cost of shipping a POV is covered by 5 U.S.C. 5724(d) *referencing* 5722(a)(3) for current employees, and by 5 U.S.C. 5722(a)(3) for new employees.

5. Reimbursement for miscellaneous expenses incurred during the move are authorized by 5 U.S.C. 5724a(f), not to exceed two weeks pay if the move includes dependents 5 U.S.C. 5724a(f)(1)(A), not to exceed one week of pay if the move is without dependents 5 U.S.C. 5724a(f)(1)(B), capped out at the GS-13 step 10 level. 5 U.S.C. 5724a(f)(2).

6. A transfer allowance, for subsistence, relocation expenses and lease penalties, not otherwise compensated for, is covered by 5 U.S.C. 5924(2). The need for subsistence expenses is 5 U.S.C. 5924(2) is largely obviated by miscellaneous expenses authorized by 5 U.S.C. 5724a(f).

7. Expenses related to the sale of a residence are covered by a PCS from outside the United States to a post in the United States is covered by 5 U.S.C. 5724a(d)(2).

8. The expenses of property management services when the employee transfers to a post of duty outside the United States are covered by 5 U.S.C. 4724a(e).

Warning: The statutory structure distinguishes between current employees, newly hired

employees at 5 U.S.C. 5722, and in some circumstances provide different rules for employees returning to the United States for separation or retirement. Unless otherwise mentioned, the discussion in this outline is limited to current employees.

B. <u>New Employee Assigned to First Official PDS Outside the United States</u>. 5 U.S.C. 5722, 41 C.F.R. 302-3.1, JTR C5010 Table 3.

1. <u>Relocation Allowances the Agency Must Pay</u>:

   a. Transportation of employee and immediate family. JTR Vol 2, Chapt 5, Part A.

   b. **Per diem for employee only.** JTR C7006-B, 5 U.S.C. 5724(a)(1).

   c. Transportation & temporary storage of HHG. JTR Vol 2, Chapt 5, Part D.

   d. Miscellaneous Expense portion of the Foreign Transfer Allowance. DSSR § 241.2.

   e. Relocation income tax allowance (RITA). JTR Vol 2, Chapt 16.

2. <u>Relocation Allowances Which the Agency Has Discretion to Pay For</u>:

   a. Shipment of POV. JTR Vol 2, Chapt.5, Part E.

   b. Foreign Transfer Allowance (FTA) Subsistence Expense for quarters temporarily occupied before departure from CONUS.

   c. Temporary Quarters Subsistence Allowance (TQSA) after arrival. DSSR § 120.

3. Use of Relocation Service Companies, Property Management Services and Home Marketing Incentive Payments are not authorized for new appointees assigned to their first PDS. JTR Vol 2, Chapt 15, Part A; 5 U.S.C. 5724a(e).

Note: The statutory distinction between new employees and current employees has existed since at lease 1967. 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967).

C. Employee Transfer from CONUS to FOCONUS PDS. 5 U.S.C. 5724; JTR C5010 Table 5.

1. Relocation Allowances the Agency Must Pay For:

a. Transportation & per diem for employee and immediate family members. JTR Vol 2, Chapt 5, Part A; 5 U.S.C. 5724a(a) *trumping contrary language at* 5724(d) *referencing* 5722.

b. Miscellaneous expense allowance. JTR Vol 2, Chapt 5, Part G.

c. Transportation & temporary storage of HHG. JTR Vol 2, Chapt 5, Part D.

d. Non-temporary (extended) storage of HHG. JTR Vol 2, Chapt 5, Part D.

e. Relocation income tax allowance (RITA).

2. Relocation Allowances the Agency Has Discretion to Pay For:

a. FTA pre-departure subsistence expense portion for temporary quarters before departure. DSSR § 242.3.

b. TQSA for temporary quarters at the foreign PDS. DSSR § 120.

c. Shipment of POV. JTR Vol 2, Chapt 5, Part E.

d. Property management services. JTR Vol 2, Chapt 15, Part B;5 U.S.C. 5724a(e).

XIV. TRANSPORTATION AGREEMENT (TA). 5 U.S.C. 5724(d) (current employees), 5722(b) (new employees); JTR C4001- C4012.

A. Requirements for a TA. "An agency may pay for [travel and transportation expenses] ... only after the individual selected for [the OCONUS] appointment agrees in writing to remain in the Government service for a minimum period of -- 12 months after his appointment, if selected for appointment to any other position." 5 U.S.C. 5722(b)(2), *applicable to current employees by* 5 U.S.C. 5724(d).

B. TAs & Duration of Tour. With respect to the agency paying travel and transportation expenses to return the employee from OCONUS, the employee

must have served for a "minimum period" to be established in advance by the person acting as "head of agency" which will be "not less than one nor more than 3 years." 5 U.S.C. 5722(c)(2).

1. In either event, going to the OCONUS duty location or on return, the time limits can be waived if the employee is "separated for reasons beyond his control which are acceptable to the agency concerned." 5 U.S.C. 5722(b), (c). Grounds for releasing an employee from a tour of duty are discussed at JTR C4009, including transfers to other agencies.

2. The rules on tour duration are somewhat different for teachers and the statute does not apply at all to the Foreign Service. 5 U.S.C. 5722(c)(2),(d).

3. DOD PCS Limitation Policy. The DOD policy is that it "is neither cost-effective nor efficient to provide more than one PCS move to a DoD employee during any 12-month period." JTR C5005-C.

   a. Exceptions. The following moves are exceptions to the 12-month period limitation.

      (1) An employee or re-employed former employee affected by RIF or transfer of functions. JTR C5005-C.2.a.(1), *citing see* C5080-C,

      (2) In connection with an agency-directed placement, C5005-C.2.a.(2).

      (3) From actual residence to a new PDS after the employee exercises return transportation rights from an OCONUS PDS under an OCONUS tour agreement, provided the employee was not furnished PCS allowances in connection with the return to actual residence. With regard to whether the employee was furnished PCS allowances the JTR states, "NOTE: An employee who signed a new agreement in connection with return to actual residence and was reimbursed TQSE and/or MEA has, in fact, been furnished PCS allowances." JTR C5005-C.2.a.(3) note.

   b. Authorizing/Order-issuing Official Certification. A transfer within the DoD, at Government expense, is not authorized within 12 months of the employee's most recent PCS unless the authorizing/order-issuing official certifies that:

      - The proposed transfer is in the Government's interest;

- An equally qualified employee is not available within the commuting area of the activity concerned; and

- The losing activity agrees to the transfer.

This policy does not preclude an employee from accepting a position, but it may cause the employee to relocate at personal expense. JTR C5005-C.2.b.

c. Decisions On Minimum Period.

- A voluntary retirement less than 12 months after a transfer constitutes grounds for an agency to require reimbursement. 61 Op. Comp. Gen. 361 (1982).

- The 12 month service obligation is to the government, not to any particular agency in the government, even when the transportation agreement requires that the 12 months be spent with the employing agency. *Finn v. United States*, 428 F.2d 828 (Ct. Cl. 1970).

- The 12 month period includes time spent by the employee in leave without pay status (LWOP) but not when in an absent without leave (AWOL) status. 59 Op. Comp. Gen. 25 (1979). But, where an employee effectively abandoned his employment by beginning to work for another employer, the 12 month requirement cannot be satisfied by a combination of applications for annual leave, sick leave, and LWOP. *John P. Maille*, 71 Comp. Gen. 199 (1992).

C. TA Defined. "A Transportation Agreement is a written understanding between a DoD component and an employee wherein the component agrees to furnish (depending on the circumstances) certain travel and transportation allowances in consideration for which the employee agrees to remain in Government service for at least a specified period. In the case of appointment or transfer to an OCONUS position, the employee also agrees to complete a prescribed tour of duty at the OCONUS PDS as consideration for return travel and transportation allowances." JTR C4001-A.

1. The return travel is to the employee's "actual residence" by which the JTR means the employee's domicile or legal residence.

2. The JTR repeatedly talks in terms of "negotiations" between the employee and the "head of agency" with respect to a TA. Oddly though,

the TA form is preprinted with no room for clauses to be added by the employee and provides for a signature only by the employee. DD Form 1617 "Department of Defense (DOD) Transportation Agreement - Transfer of Civilian Employees Outside CONUS (OCONUS)" (Nov. 1999) (available at www.dior.whs.mil).

3. OCONUS locally hired employees get the same TA allowances as an employee who came from CONUS but with a possible limit on the ability to ship a POV. JTR C4002-B.1.d, *referencing* C5212-A5 (Employees hired OCONUS for their first duty in CONUS are not authorized to ship a POV at government expense; and OCONUS shipments of POVs are only authorized when the POV is to be used at an OCONUS PDS), *noting* 5 U.S.C. 5727 *and referencing see* 68 Comp. Gen. 258 (1989)).

4. The TA may be an initial agreement or a renewal agreement. JTR C4001-A. A renewal agreement is signed when the employee completes the initial tour and agrees to a follow-on OCONUS tour.

   a. It is the "initial agreement" that "establishes eligibility for round trip travel and transportation allowances." JTR C4001-A.

   b. "A renewal agreement establishes eligibility for round trip travel and transportation allowances for an employee and dependents for the purpose of taking leave between consecutive periods of OCONUS employment. **A renewal agreement does not establish any HHG transportation authority**," JTR C4001-A (emphasis added), except for dependents who did not accompany the employee on the previous overseas tour. JTR C4002-B.3.

D. <u>When TA Eligibility Should Be Determined</u>. Determine the employee's TA or continued TA eligibility before extending the job offer! The actual JTR provision is written for OCONUS TAs, but the provision is applicable to all TAs. "Eligibility ... must be determined at the time of appointment or at the time the employee loses eligibility for return travel and transportation allowances. **This avoids misunderstandings later.**" JTR C4002-B1.c (emphasis to understatement added). Typically, the JTR provides no guidance on how to proceed when a problem arises and TA eligibility has not been determined up front or the employee was not informed that when they took a subsequent position that they lost their TA eligibility.

1. <u>Failure to Negotiate TA at Time of Initial Hire & Subsequent Positions</u>. What happens when an overseas hire, having taken the first position without a TA, subsequently applies for a second position? Do the DOD CPM/JTR/DSSR provisions for granting a TA apply to the first position

the person held or the second position the person is going into? There is no answer in any of the instructions. My recommendation is to justify the TA for both positions. Within the office of DASN(CP/EEO), the focus has been on the second position. That is, the question is whether the recruitment action for filling the second position justifies granting a TA under the criteria in the applicable instructions.

E. **Authority to Negotiate**. For all DOD components, the following have authority to negotiate TAs:

1. Commanding officers and their civilian counterparts who have appointing authority to fill positions, JTR C4001-B.1;

2. Civilian personnel office employees designated to act for a CO in effecting personnel appointments, JTR C4001-B.2; and,

3. Other individuals designated by the CO in specific cases. JTR C4001-B.3.

F. **Loss of a TA** is discussed at JTR C4008 and employee violations of TA are discussed at JTR C4009 and C4352-C4353.

G. **Eligibility Requirements**. TA eligibility requirements for CONUS employees going OCONUS is unremarkable. That is not the case with regard to giving TAs to local hires. TA eligibility for OCONUS local hires take up most of the discussion in the JTR. Indeed, for OCONUS local hires the JTR emphasizes, "***A transportation agreement for a locally hired employee is not an entitlement. ... Individuals must not automatically be granted agreements simply because they meet eligibility requirements.***" JTR C4002-B.1.a. (bold italic in original). As is typical of the instructions for overseas allowances however, the JTR does not relate that having met the eligibility requirements (which in itself is a misnomer) what additional criteria should be considered in deciding whether to grant a TA?

Note: **Impact of TA on Other Benefits:** Individuals without a TA (typically OCONUS locally hired American citizens) are NOT eligible for:

- Evacuation payments or allowances, DSSR § 612.3.(2);

- Emergency Visitation Travel (EVT) paid by the agency for visits home to sick relatives or funerals, JTR C6675-G.1;

- Depending on other circumstances, will not qualify for annual leave accumulation beyond 30 days (240 hours), 5 U.S.C. 6304(b)(2)(A)(iii); or

- Foreign Visitation Travel (FVT) for employees at a FOCONUS PDS to visit family members who have been evacuated from the PDS. JTR C6650-D.1.

H. <u>These Are the Simple OCONUS Circumstances to Grant a TA:</u>

1. An employee transferred from one OCONUS PDS to another OCONUS PDS. JTR C4002-A.2. Note, there is no requirement for the employee to have had a TA at the original OCONUS PDS, and unlike LQA, neither is there a requirement that the employee's position move from the first PDS to the second PDS in order to be eligible for a TA.

2. A new appointee recruited for OCONUS duty at a PDS other than where the actual residence is located. JTR C4002-A.3.

3. An employee recruited OCONUS for assignment to an OCONUS PDS. JTR C4002-A.6.

4. Note, in each of these circumstances the JTR states that TA's "must be negotiated" but never actually states that a TA must be issued. JTR C4002-A.

I. <u>These are the More Complex OCONUS Circumstances to Give Local Hires a TA</u>.

Warning: Determining TA eligibility for OCONUS local hires is especially tricky. Not only does management have to wend its way through the CPM, JTR and DSSR requirements described below, and get all the relevant offices to agree the hiring action meets these requirements, the resulting documents also need to meet the host nation immigration requirements (will the person hired have the right passport and right visa or other documents to satisfy the host nation immigration requirements?) - if management wants to provide a local candidate with a TA, the best advice when recruiting a person in the local area for a position that is normally filled from CONUS is to hire the person as if the person was hired in CONUS, e.g., instead of having a sailor discharge at the OCONUS PDS, have the sailor out-process from the Navy in Norfolk and hire the person from there as a CONUS hire rather than at the OCONUS PDS where they have been stationed.

1. <u>Purpose of OCONUS TAs</u>. "The transportation agreement for a locally hired employee is specifically intended to be a recruitment incentive for a

civilian employee with an actual residence in CONUS or a non-foreign OCONUS area, outside the geographical locality of the PDS to accept Federal employment in a foreign or nonforeign OCONUS area." JTR C4002-B.1. Thus, the basic requirements are:

a. The TA is a recruiting incentive.

b. The employee has to have an "actual residence" in CONUS or a non-foreign OCONUS area (e.g., Hawaii).

(1) The TA is recorded on a DD Form 1617. Block G asks for "Actual Residence at Time of Appointment (To be determined at time of initial agreement)." The address to put here is NOT where you are actually living overseas, but your home of record or legal residence - the (typically) CONUS destination the government is required to return you to after the end of your OCONUS tour.

2. The JTR Divides TAs for OCONUS Local Hires Into Two Categories:

- TAs for Foreign OCONUS (F-OCONUS) areas; and

- TAs in non-Foreign OCONUS (NF-OCONUS) areas.

According to the JTR, there are more requirements for getting a TA in a NF-OCONUS than a foreign one, though in practice, personnel offices may apply the additional requirements to TAs for local hires in F-OCONUS as well. The additional requirement for NF-OCONUS hires is that the position must be one for which qualified applicants are not readily available, i.e., the selecting official would typically be hiring from CONUS with a TA anyway. JTR C4002-B.1.d.

3. Giving TA's to an F-OCONUS Hire - Former Members of the U.S. Forces. In order to give a TA to an F-OCONUS local hire applicant who is a former member of the Armed Forces, three requirements have to be met. (Be in the authorized category, e.g., a separating military member, and as stated in JTR C4002-B2a., meet the "requirements in par. C4002-B.2.b(1) and C4002-B.2.b(2).") With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following conditions are met:

a. Requirement 1 (JTR C4002-B.2.a(1)): The locally hired employee:

- was a member of the Armed Forces of the United States,

- while serving in a F-OCONUS area,

- is being appointed to a vacant appropriated fund civilian position before the expiration of the individual's TA accruing from the prior military service,

- and finally, that the vacancy is located in the same country where the former military member separated/retired from the Armed Forces.

Note: It is important not to turn these requirements into restrictions limiting the ability to hire non-local overseas applicants. This discussion is for locally hired applicants - not applicants who are from outside the local area. For DOD's purposes, "locally hired" means from within the country in which the post is located. DOD 1400.25-M SC 1250.3.4. Thus, the restrictions on giving a TA to local hires should not apply to an FOCONUS applicant from another country.

b. Requirement 2: The local area commander must determine that another candidate likely would have had to be transferred or appointed from the U.S. or a different OCONUS location to fill the position unless a TA is offered to the locally hired candidate. The JTR emphasizes, "***A locally hired candidate is not eligible for an agreement if the position is one for which out-of-country recruitment normally is not undertaken.***" JTR C4000-B.2.b(1) (emphasis in original).

c. Requirement 3: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might establish an ineligible overseas domicile if the employee has participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence, i.e., has come OR in the country. JTR C4004-B.2.

d. Additional Navy Requirement - Difficulty in Recruiting & Retention. Personnel Specialists within the office of the Deputy Assistant Secretary of the Navy (Civilian Personnel/Equal Employment Opportunity) (DASN (CP/EEO)) have also imposed an additional requirement on granting a TA to an overseas local hire - the activity

must demonstrate difficulties in recruiting and retention for the overseas position in order to justify granting a TA.

(1) Basis for Additional Requirement. The source for the "recruiting and retention difficulties" requirement is the basic policy statement regarding overseas allowances in the DOD CPM that, "If a person is already living in the foreign area, that inducement is normally unnecessary." DOD 1400.25-M, SC 1250.4.1. There is no direct or referenced mention to "recruiting & retention difficulties" with respect to TA's. But the view is that since a TA "is normally unnecessary" for an overseas applicant, the hiring activity would need to show "recruiting & retention difficulties" to show that a TA is necessary.

(2) In this view, a "recruiting & retention problem" is not the same as saying that the position would normally be filled by a person from the United States (requirement 2).

4. Giving TA's to an F-OCONUS Hire: Employees of Other Government Activities, Contractors & International Organizations. In order to give a TA to an F-OCONUS local hire applicant who is an employee of another government activity, government contractor or international organization, three requirements have to be met: Be in the authorized category, e.g., an employee of another federal agency, and as stated in JTR C4002-B2a., meet the "requirements in par. C4002-B2b(1) and C4002-B2b(2)." With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following conditions are met:

a. Requirement 1 (JTR C4002-B.2.a.(2)): The locally hired employee was:

(1) An employee of:

(a) another Federal department, agency, or instrumentality, or non-appropriated-fund activity,

(b) Government contractor,

(c) International organizations in which the U.S. participates, or

(d) Any other activity/agency which the F-OCONUS area command determines to be operating in support of the U.S. or its personnel in the area.

(2) When, the individual was:

(a) recruited in CONUS or in a NF-OCONUS area under employment conditions that provided for return travel and transportation allowances. JTR C4002-B.2.a.(2)(a). This provision is a bit obscure, but is taken to mean that the person had been recruited by the previous employer in the States (the DOD activity is now hiring him/her from the previous employer) and had the equivalent of a TA with the previous employer.

(b) Committed to a specific vacant position with the DOD activity before separation from prior employment, (JTR C4002-B.2.a.(2)(b), and,

(c) Is appointed not later than 1 month after termination of such employment. JTR C4002-B.2.a.(2)(c).

b. Requirement 2: The local area commander must determine that another candidate likely would have had to be transferred or appointed from the U.S. or a different OCONUS location to fill the position unless a TA is offered to the locally hired candidate. The JTR emphasizes, "***A locally hired candidate is not eligible for an agreement if the position is one for which out-of-country recruitment normally is not undertaken***." JTR C4000-B.2.b(1) (emphasis in original).

c. Requirement 3: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might have established an ineligible overseas domicile if the employee has participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

5. Giving TA's to an F-OCONUS Hire: Riffed Government Employees. In order to give a TA to an F-OCONUS applicant who has been riffed, two requirements have to be met: Be in the authorized category, e.g., a riffed government employee, and as stated in JTR C4002-B.2.a., "An initial [TA] agreement may be negotiated with a locally hired employee

described in par. C4002-B.2.a(3) ... only if the employee also meets the requirement in par. C4002-B.2.b(2)." With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following two conditions are met:

a. Requirement 1 (JTR C4002-B.2.a.(3)): The former government employee:

- Was separated by a RIF in the previous 6 months,
- Is on a reemployment priority list, and
- Has been authorized delay in return travel for the primary purpose of exercising reemployment priority rights.

Comment: There is no requirement to establish that another candidate would have been hired from CONUS if the local F-OCONUS applicant wasn't available.

b. Requirement 2: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might have established an ineligible overseas domicile if the employee has participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

6. Giving TA's to an F-OCONUS Hire: To the F-OCONUS Dependent Spouse of an F-OCONUS Government Employee or Military Member.

a. Note, from the context of the regulation it appears that an F-OCONUS spouse could also be given a TA after already having been hired by the DOD component. The spouse wouldn't have needed a TA prior to, for example, the death of the sponsor, and it would seem an extremely limited situation that the F-OCONUS sponsor dies, and then the surviving spouse decides to go to work and needs a TA in his/her own right. There is nothing in the language of the JTR C4002-B2 that prohibits a TA being issued to an employed surviving spouse subsequent to the death of the sponsor. This is unlike the other

situations where it is clear the TA would be issued to the F-OCONUS applicant upon hire.

b. In order to give a F-OCONUS spouse of a F-OCONUS sponsor a TA, two requirements have to be met: Be in the authorized category, e.g., an F-OCONUS spouse, and as stated in JTR C4002-B2a., "An initial [TA] agreement may be negotiated with a locally hired employee described in ... par. C4002-B2a(4) below only if the employee also meets the requirement in par. C4002-B2b(2)." With respect to "OCONUS Local Hires" the JTR provides that "[f]oreign area local commanders shall negotiate an initial agreement with a locally hired employee" when the following two conditions are met:

(1) Requirement 1 (JTR C4002-B.2.a.(4):

(a) The F-OCONUS spouse:

(i) Accompanied/followed the sponsoring military or civil service spouse to the F-OCONUS area,

(ii) As the dependent, had authorization for return transportation under the sponsoring spouse's TA,

(b)When one of the following occurs:

(i) the sponsoring spouse dies;

(ii) the sponsoring spouse becomes physically or mentally incapable of continued government employment,

(iii) a divorce or legal separation

(I) "A legal separation when either the employee or the spouse initiates legal action to dissolve the marriage or one separates from bed and board short of applying for a divorce."

(II) A "Fidelity Tax" applies. The TA is "canceled" if the couple remarries or reconciles.

(iv) or, the sponsoring spouse "permanently departs the post/area."

(I) The TA is "canceled" if the sponsoring spouse returns to the post regardless of whether the

sponsoring spouse has return transportation eligibility.

(II) Note, this regulatory distinction between "post/area" is unclear, and as interpreted, the distinction between post/area is probably redundant. The Navy rejected the proposal that when the sponsoring spouse retires, they have departed the post where the sponsoring spouse remained in the area.

Comment: There is no requirement to establish that another candidate would have been hired from CONUS if the local F-OCONUS spouse wasn't available.

(2) Requirement 2: At the time of appointment or assignment, the locally hired candidate must be able to establish to the satisfaction of the appointing official "a bona fide actual residence" in CONUS or a NF-OCONUS area. JTR C4002-B.2.b(2). The criteria for determining "a bona fide actual residence" is described in JTR C4004-B. The JTR phrase, "bona fide actual residence" essentially means the employee's domicile or "legal residence." The JTR list of criteria for determining actual residence is a fairly typical list for determining domicile. JTR C4004-B.2. The JTR notes that a person might have established an overseas domicile if the employee has participated in local elections or obtained a waiver of U.S. tax liability based on a foreign residence. JTR C4004-B.2.

(3) Example Where TA Was Denied. A dependent military spouse was competitively hired for a position that is normally recruited and filled by the transfer of an employee from the States. Contemporaneously, his military spouse retired from active duty, but instead of returning to the States, she remained in the overseas area due to her husband's selection for the civilian position. Hiring the local candidate saved the government the cost of a PCS. Nevertheless, a TA was denied because none of the criteria of JTR C4002-B.2.a.(4) were met - the sponsoring retired military spouse had not left the service due to a physical or mental incapability, had not died, had remained in the local area and the couple had not divorced or separated. Letter, From OASN(M&RA) to Commanding Officer, NRCC Naples, Italy, "Living Quarters Allowance Waiver Request" (August 22, 2000). At the same time, LQA was granted under the DSSR regulations § 031.12. This is because the DSSR has a waiver provision for LQA while the JTR provisions for a TA do not.

XV. NOT MOVING FAMILY OVERSEAS - SEPARATE MAINTENANCE ALLOWANCE (SMA). 5 U.S.C. 5924(3); DSSR part 260.

A. Purpose of SMA. SMA is available to assist an employee to meet the additional expenses of maintaining the employee's spouse or dependents away from the employee's overseas post, when:

- the employee is "compelled or authorized" to do so "because of dangerous, notably unhealthful, or excessively adverse living conditions" at the overseas post;

- "or for the convenience of the Government";

- or where the employee requests the allowance "because of special needs or hardship involving the employee or the employee's spouse or dependents."

5 U.S.C. 5924(3).

1. SMA is granted in lieu of any travel, transportation or other allowances for those members of the family. An employee who is receiving SMA on behalf of a family member is not eligible for other allowances on behalf of that family member except as provided. DSSR § 261.2, *referencing* §242.7 (Transfer allowances payable to an employee with SMA family members), §252.8 (Home service transfer allowance and SMA), §262.3b (Transitional SMA following end of evacuation) and §267 (Determination of SMA rate).

B. Amount. SMA ranges from $4,300 per year for a single child to $15,900 for one adult and four or more additional family members. DSSR §267.1.a.

1. There are different circumstances for the grant of SMA, but generally allowances is effective the date of approval or the date of separation, whichever is later. DSSR §§ 265.1, 265.2. SMA is NOT retroactive. But, the DSSR also says that Involuntary SMA is effective the first day of separation or when the SF-1190 is submitted, whichever is later. DSSR § 262.4.a.Note.

C. Types of SMA.

1. Involuntary SMA Is For The Convenience Of The Government. SMA is typically granted when the OCONUS PDS is adverse, dangerous or notably unhealthy, and the agency has determined the need to exclude dependents from accompanying the employee. DSSR § 262.1.

    a. Involuntary SMA for a child terminates when the child is 21 unless the child is determined to be incapable of self support (due to a physical or mental impairment). A child in post secondary school/college and not currently working is NOT considered to be incapable of self support.

2. Voluntary SMA Is For Special Needs Or Hardship Of The Employee. It may be authorized when an employee requests SMA for special needs prior to or after arrival at the PDS for reasons including but not limited to career, health, educational or family considerations for the spouse or other dependents. DSSR § 262.2.

    a. Voluntary SMA cannot be in the same country or be within 300 miles of the employee's PDS. DSSR § 263.7.

    b. Voluntary SMA terminates on a child's 18th birthday unless the child is determined to be incapable of self support (due to a physical or mental impairment). DSSR § 262.2.

3. Transitional SMA Involving Evacuation & Conversion of Post to Unaccompanied Status. When employees/dependents have not yet arrived at a post which is under an evacuation/departure order and the employee has to continue to the post without the family, if the family doesn't qualify for DSSR Chapter 600 "Payments During Evacuation/ Authorized Departure," or the equivalent payments under the limited provision of DSSR § 245, then, dependents who would normally accompany the employee to the post would be eligible for an involuntary Separate Maintenance Allowance. DSSR § 639 ("Employees/ Dependents Assigned but Not Arrived at Post"), *referencing* § 260 ("Separate Maintenance Allowance"). See discussion at page 225.

D. Number of Choices Per Tour. After an initial election to move the family overseas or not, only one change of election may be approved for Voluntary SMA. For example, employee moves with dependent child to OCONUS PDS. Due to adjustment problems, employee elects to return child to the States to live with other family members and attend school there. Later, the employee wants to bring the child back from the States to the OCONUS

PDS. The employee can bring the child back at the employee's own expense but, having made one change already, the child will not add any entitlement to the employee's allowances. DSSR § 264.2(2).

E. **Qualifying For SMA**. SMA may be granted when the employee is separated from a member of a family and the conditions in DSSR § 262 reasonably appear to require a separation of at least 90 days or more. DSSR § 262.4a.

1. The 90 days may be reduced to 30 days when:

   a. adequate medical facilities are not available in the area for pre- and post natal care, DSSR § 262.4.a(1);

   b. members of the family are detained in the United States for medical clearance, DSSR § 262.4.a(2); or,

   c. children must begin or complete a school year before the employee has arrived at post or after the employee has departed on transfer to another post in a foreign area. DSSR § 262.4.a(3).

2. Voluntary SMA is not available for the following situations (the absence of which the employee must certify to in the SMA application):

   a. A family separation due to a legal separation from a spouse occurring through a divorce decree, whether limited, interlocutory, or final. DSSR § 262.3, 264.2(2).

   b. A child whose legal custody is vested wholly, or in part, in a person other than the employee or the employee's current spouse, except for extraordinary circumstances. DSSR § 262.4, 264.2(2).

   c. A child for whom the employee has joint legal custody and who will be residing with the other parent, except for extraordinary circumstances. DSSR § 262.4, 264.2(2).

   d. A child, brother or sister, 18 years of age or older. Where the child is attending secondary school beyond 18, that the employee must terminate the SMA within 3 months from the day the child leaves secondary school. DSSR § 264.2(2).

F. **Visits By SMA Dependents**. When SMA dependents visit the employee's PDS, SMA continues for 30 days. If the SMA dependent has not departed by

the 31st day, then SMA will be suspended until the SMA dependent departs en route to the SMA point. DSSR § 265.4.

G. **Termination of SMA**. When the employee transfers to a new post, SMA terminates. The employee must reapply for SMA at the new post. DSSR § 266.2.

H. **Applying for SMA**. An SF-1190 is used to submit a request for SMA accompanied by a memo requesting SMA, the required certifications, and other support for the claim, e.g., a doctor's statement. *See* DSSR § 264.1 (Involuntary SMA).

XVI. THE PCS - MOVING TO AN OVERSEAS ASSIGNMENT.

A. **Authority to Pay for Civilian Moves OCONUS**. The basic authority to pay for: PCS travel expenses is 5 U.S.C. 5724(a)(1); for storage or transport of HHG not to exceed 18,000 pounds is 5 U.S.C. 5724(a)(2); and for other allowances connected with the move the basic authority is 5 U.S.C. 5724a. For overseas moves, the Secretary of Defense may provide civilian employees, and members of their families, abroad with travel benefits comparable to benefits provided by the Secretary of State to members of the Foreign Service and their families abroad. 10 U.S.C. 1599b. "When an employee transfers to a post of duty outside the continental United States, his expenses of travel and transportation to and from the post shall be allowed to the same extent and with the same limitations prescribed for a new appointee under section 5722 of this title." 5 U.S.C. 5724(d) (note, despite that language about current employees being treated as a new hire, section 5724a provides different rules for the transfer of current employees).

1. Moves Must Be in the Government's Interest to Fund the Move, Not The Employee's. The "agency shall pay from Government funds - (1) the travel expenses of an employee transferred **in the interest of the Government** from one official station or agency to another for permanent duty ... ." 5 U.S.C. 5724(a) (emphasis added), *see also, e.g.,* 5 U.S.C. 5724a(a). "When a PCS is authorized ..., PCS allowances must be paid to an employee transferred from one PDS to another for permanent duty **if** the transfer is in the Government's interest." JTR C5005-B (internal reference omitted, emphasis added). "When a transfer is made primarily for the convenience or benefit of an employee ... or at his request, his expenses of travel and transportation and the expenses of transporting, packing, crating, temporarily storing, draying, and

unpacking of household goods and personal effects may not be allowed or paid from Government funds." 5 U.S.C. 5724(h).

2. So How Do We Know When The Move Is In The Agency's Interest And When It's In The Employee's Interest?

a. The basic rule is that it is the agency that determines whether the move is in the best interests of the government and GSA Board of Contract Appeals (GSBCA) will not overturn an agency's determination unless the GSBCA is convinced the agency' determination is "arbitrary, capricious, or clearly erroneous." *Timothy A. Burgess*, 16725-RELO (GSBCA Oct. 25, 2005), *citing Armando G. Solis*, 15713-RELO (GSBCA Apr. 12, 2002); *Gerard R. Sladek*, 14145-TRAV (GSBCA Nov. 7, 1997).

b. Subject to the agency's rules, the GSBCA view is that, "Ordinarily, when an employee responds to a vacancy announcement and is selected for a position which results in a promotion, the transfer is presumed to be in the interest of the Government. However, when an employee applies for a position at the same grade with no promotion potential or for a transfer to a lower-graded position, the transfer is not presumed to be in the interest of the Government. This is true even if the employee is selected for the position after responding to a vacancy announcement." *Timothy A. Burgess*, 16725-RELO (GSBCA Oct. 25, 2005), *citing see Paul C. Martin*, 13722-RELO, 98-1 BCA 29,412 (GSBCA Dec. 11, 1996).

c. DOD Rule. DOD's guidance, such as there is, is provided in JTR C5005. The JTR describes five situations where PCS is in the government's interest and a more general description when a move is not in the government's interest and for the massive gray area in between, states the "PCS allowances determination is to be based on factors such as cost effectiveness, labor market conditions, and difficulty in filling the vacancy," emphasizing that, "***Budget constraints do not justify PCS allowances [sic] denial***." JTR C5005-B.3.b (bold, italic text in original). In other words, within DOD, there is broad discretion to determine if a move is in the government's interest, except that lack of funds does not justify a determination that a move is not in the government's interest if it otherwise is.

(1) Moves Defined by JTR as in the Government's Interest. "If a DoD component recruits/requests an employee to transfer (i.e., RIF, transfer of function, agency career development program, or

agency directed placement); the transfer is in the Government's interest." JTR C5005-B.1.

(2) Moves Not in the Government's Interest. "If an employee pursues, solicits or requests (not in response to a vacancy announcement) a position change resulting in a geographic move from one PDS to another, the transfer is for the employee's convenience and benefit." JTR C5005-B.2 (parenthetical comment in original). Whether the parenthetical JTR comment "(not in response to a vacancy announcement)" is intended to contradict the general GSBCA rule described above is unclear. Where the successful applicant had applied for a lower graded position, the GSBCA has allowed an agency to verbally notify the selectee before the move the that PCS costs will not be paid even where the vacancy stated the costs would be reimbursed. *Timothy A. Burgess*, 16725-RELO (GSBCA Oct. 25, 2005). In any event, the "gaining activity must formally advise the employee at the time an offer is extended that the transfer is in the employee's interest, not in the Government's interest, and that the Government does not pay the PCS expenses." JTR C5005-B.2. Generally, DOD does not authorize funding of more than one PCS move in a 12 month period. JTR 5005-C. Exceptions are discussed on page 80-81.

(3) JTR Notice Requirements. Generally, whether the government will pay for a PCS should be stated in the vacancy announcement. The JTR also allows the determination of PCS allowances to be "made after applicants have been referred to the selecting official." JTR 5005-B.3.a. The decision not to pay PCS allowances must be documented. JTR 5005-B.3.c(1). All interviewed candidates must be notified in writing of the decision not to pay PCS allowances. JTR 5005-B.3.c(2). If no interviews are held, then only the selectee needs to be informed in writing "whether or not PCS allowances are to be paid." JTR 5005-B.3.c(3).

3. Cases. The following Comptroller General and GSBCA decisions need to be understood in the context of the general GSBCA rule described above.

a. No reimbursement of moving expenses allowed where employee made written request for transfer, agreeing to pay own moving expenses, in order to be located to office in area where wife had accepted employment with a private company, and where there was no showing that government had special need for employee at new

office. *McClary v. United States*, 14 Cl. Ct. 728 (1988).

b. Employee not entitled to reimbursement for relocation expenses since he applied for and otherwise took the initiative in obtaining a transfer. 56 Comp. Gen. 709 (1977). Where the employee voluntarily applies for a transfer at the same grade as already held, the transfer is presumed NOT to be in the interest of the government - even where the employee has responded to the vacancy announcement and has been competitively selected. *Steven D. Hanson*, 14270-RELO (GSBCA Oct. 7, 1997).

c. BUT: For the purpose of determining relocation benefits, where selection and transfer of employee is pursuant to merit promotion program, it is generally deemed to be action taken in the interest of the government. *Steven G. Lovejoy*, 15826-RELO (GSBCA Oct 3, 2002). Generally, where an agency recruits or requests employee to transfer to a different location, such transfer is regarded as being in the interest of the government and PCS costs are payable. *Darrell M. Thrasher*, 13968-RELO (GSBCA Sept. 9, 1997).

d. Transfer back to CONUS was not for the convenience of the employee where family member developed serious medical condition. Employee was in Saipan with TA which authorized early return in the event of serious illness of any member of the employee's immediate family. His wife became ill 20 months into the tour and he asked to be released from the agreement and returned to the United States. The agency agreed. B-163113,1968 U.S. Comp. Gen. LEXIS 2419 (June 27, 1968) (Question 4, decision under Bureau of the Budget Circular No. A-56).

B. **<u>Advance Pay</u>**. Up to three months advance pay can be paid upon assignment of an employee to a post in a foreign area. 5 U.S.C. 5927(a)(1). The DOD Civilian Personnel Manual provides that the advance in pay can be made when the employee is proceeding to, or arriving at, a foreign post. DOD 1400.25-M SC 1250.5.1.4.1, *referencing* DOD 7000.14R "DOD Financial Management Regulations," Volume 5, "Disbursing Policy and Procedures" *and* Volume 8, "Civilian Pay Policy and Procedures" (June 1994).

1. To apply for advance pay submit an SF-1190, the most recent leave and earnings statement, and a copy of the transfer orders. In the Navy the application is made to the HRSC servicing the destination PDS.

2. Repayments will be made by payroll deduction over a maximum 26 pay periods, or partial, or lump-sum payments. Repayment begins the first

pay period after receipt or following arrival at the foreign post, whichever is later. DOD 1400.25-M SC 1250.5.1.4.2.

C. Setting Travel & Per Diem Rate. The per diem rate for the continental United States is set by GSA. 5 U.S.C. 5702(a)(1)(A). Outside the continental United States the per diem rate is set by the President or his designee for travel. 5 U.S.C. 5702(a)(1)(A).

D. Entitlement to Travel & Transportation Allowances - Who Gets What. This subject is best described in 41 C.F.R. Subchapter B "Relocation Allowances" Part 302-3 "Relocation Allowance by Specific Type," *see also* 5 U.S.C. 5722, JTR C5010.

1. New Appointees When First Official Station is OCONUS.

   a. Are defined at 41 C.F.R. 302-3.1. Not specifically addressed are military members who join civil service - but they would also be new appointees. *See Edward J. Curran*, 15447-RELO (GSBCA Apr. 4, 2001).

   b. Agencies must pay the following relocation allowances (5 U.S.C. 5722(a), 41 C.F.R. 302-3.1, Table B, Column 1):

      (1) Transportation of employee & immediate family;

      (2) Per diem for employee only;

      (3) Transportation & temporary storage of household goods (HHG); and,

      (4) Extended storage of HHG.

   c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.1, Table B, Column 2):

      (1) Shipment of POV;

      (2) Foreign Transfer Allowance (FTA) (subsistence expense) for quarters occupied temporarily before departure;

      (3) Temporary quarters subsistence allowance (TQSA) at the foreign destination; and

(4) The miscellaneous expense portion of the FTA is authorized incident to first official station travel to a foreign area.

2. Employees Transferred from CONUS to OCONUS.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table B, Column 1):

(1) Transportation & per diem for employee & immediate family, 5 U.S.C. 5724a(a) *trumping contrary language at* 5724(d) *referencing* 5722.

(2) Miscellaneous expense allowance;

(3) Transportation & temporary storage of HHG;

(4) Extended storage of HHG; and,

(5) Relocation income tax allowance (RITA).

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table B, Column 2):

(1) A Foreign Transfer Allowance (FTA) for quarters occupied temporarily before departure;

(2) Temporary quarters subsistence allowance (TQSA) at the OCONUS PDS;

(3) Property management services; and,

(4) POV shipment.

3. Employees Transferred from OCONUS to CONUS.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table C, Column 1):

(1) Transportation & per diem for employee & immediate family, 5 U.S.C. 5724a(a) *trumping contrary language at* 5724(d) *referencing* 5722;

(2) TQSA may be authorized preceding final departure subsequent to the necessary vacating of residence quarters;

(3) Miscellaneous expense allowance;

(4) Sale & purchase of residence transaction expenses or lease termination expenses when employee is transferred in the interest of the Government to a different non-foreign area official station than from the official station from which transferred when assigned to the foreign official station;

(5) Transportation & temporary storage of HHG;

(6) Extended storage of HHG only when assigned to a designated isolated official station in CONUS; and

(7) Relocation income tax allowance (RITA).

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table C, Column 2):

(1) Shipment of a POV.

4. Employees Transferred Between OCONUS Stations.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table D, Column 1):

(1) Transportation & per diem for employee & immediate family, 5 U.S.C. 5724a(a) *trumping contrary language at* 5724(d) *referencing* 5722;

(2) TQSA;

(3) Transportation & temporary storage of HHG;

(4) Miscellaneous expense allowance;

(5) Extended storage of HHG; and

(6) Relocation income tax allowance (RITA).

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table D, Column 2):

(1) Shipment of a POV; and

(2) Property management services.

5. Employees Returned From OCONUS to Place of Actual Residence (Domicile) for Separation.

a. "Employees" may include employees separated as a result of a RIF or transfer of function who are re-employed within 1 year. 41 C.F.R. 302.100.

b. Agencies must pay the following relocation allowances (41 C.F.R. 302-3.101, Table F, Column 1):

(1) Transportation for employee & immediate family;

(2) Per diem for employee only; and

(3) Transportation & temporary storage of HHG.

c. Agencies have the discretion to pay or reimburse the following: (41 C.F.R. 302-3.101, Table F, Column 2):

(1) Shipment of a POV.

E. Transfer of New Employee. For a new appointee and "his immediately family" an agency may pay for the travel, transportation and movement of household goods and personal effects (subsection (a)(1)) and transporting a privately owned vehicle (POV) (subsection (a)(3)), "from the places of actual residence at the time of appointment to the place of employment" OCONUS. 5 U.S.C. 5722.

1. The new appointee must agree to stay OCONUS for a period of 12

months after his appointment (subsection (b)(2)), or for one school year for a teaching position with DOD (subsection (b)(1)). 5 U.S.C. 5722 (except if a substitute teacher).

a. If the employee or teacher leaves before the allotted time, then the "money spent by the Government for the expenses is recoverable from the individual as a debt due the Government" unless the individual is "separated for reasons beyond his control which are acceptable to the agency concerned." 5 U.S.C. 5722(b).

2. The JTR provision on individuals recruited for an OCONUS PDS focuses on dependent travel.

a. When a person is recruited in CONUS for an OCONUS PDS, dependent travel is authorized from the actual residence to the OCONUS PDS. JTR C7002-B.2.a. Dependent travel of persons recruited OCONUS for assignment to an OCONUS PDS in a locality different from the actual PDS, is authorized to the new PDS. JTR C7002-B.2.b. The major exception being restrictions on dependent travel to the new PDS discussed in JTR Vol 2, Chapter 12 "Evacuation and Adverse Conditions Travel."

b. When a person is recruited locally OCONUS for employment in the same OCONUS area and a TA is executed iaw JTR C4002-B2, dependent travel is authorized from their actual residence to the PDS provided the dependents are not in the OCONUS area when the employment begins. The major exception being restrictions on dependent travel to the new PDS discussed in JTR Chapter 12 "Evacuation and Adverse Conditions Travel."

3. Travel expenses not authorized for a person who traveled from New York to England and then was hired in England when he was not a new appointee nor an appointee at all at the time of his departure from New York, nor was he entitled to expenses incurred in traveling to and from the United States following the hiring in England. *Schremp v. United States*, 166 F.Supp. 610 (Ct. Cl. 1958).

4. Former active duty Army officer is considered a new appointee rather than an employee for purposes of relocation benefits upon accepting civilian employment with DOD. *Edward J. Curran*, 15447-RELO (GSBCA Apr 4, 2001).

F. **<u>Transfer of Current Employee</u>**. There are two statutes dealing with the transfer of current employees and they say different things. "When an

employee transfers to a post of duty outside the continental United States, his expenses of travel and transportation to and from the post shall be allowed to the same extent and with the same limitations prescribed for a new appointee under section 5722 ... ." 5 U.S.C. 5724(d). But 5 U.S.C. 5724a also provides for the transfer of current employees. The biggest difference between the two is that new employees are traveling to their first PDS are not entitled to per diem for their family under section 5722 (which 5724(d) makes applicable to current employee in OCONUS moves), while section 5724a(a) specifically provides for family member per diem when an employee transfers between old and new official stations. DOD follows section 5724(a).

1. Minimum Notice of PCS Move. "The regulations prescribed under this section ... shall take effect only after the employee has been given advance notice for a reasonable period. Emergency circumstances shall be taken into account in determining whether the period of advance notice is reasonable." 5 U.S.C. 5724(j). As implemented in the JTR, "The permanent duty reassignment/ transfer of any employee from one PDS or DoD component to another, which is outside an employee's commuting area, is effective after the employee has been given reasonable advance notice (at least 30 days). ... DoD components should give as much advance notice as possible to enable the employee to begin the arrangements necessary when relocating family and residence."

    a. Exceptions to the 30-Day Notice Rule. "A reasonable advance notice period should not be less than 30 days except when:

        a. The employee and both the losing/gaining agencies agree on a shorter period;

        b. Other statutory authority and implementing regulations stipulate a shorter period (see OPM regulations for specified time frames); or

        c. There are emergency circumstances.

        JTR C1050-B.4

2. Underlying Concept. Employee entitled to ship household goods to an overseas duty post may ship goods from or to any location, but the maximum expense born by government is limited to the cost of a single shipment by the most economical route from the employee's last official station to the new official station. 60 Comp. Gen. 30 (1980).

3. JTR Provision for moves to and between OCONUS PDSs focuses on

dependent travel. When a current employee goes from a CONUS PDS to an OCONUS PDS dependent travel may originate at the employee's PDS, some other place, partially or both, with limits on costs to an alternate destination. JTR C7002-B.1.a. When the transfer is between OCONUS PDSs, travel is authorized for the dependents to the new PDS, or when an employee is authorized travel back to the actual residence (i.e., back home), the employee may elect to have the dependents return to the actual residence. JTR C7002-B.1.b. The major exception being restrictions on dependent travel to the new PDS discussed in JTR Vol 2, Chapter 12 "Evacuation and Adverse Conditions Travel."

4. When the dependents did not accompany the employee on the initial tour and the employee agrees to serve an additional OCONUS tour and executes a renewal agreement, whether for the same or a different OCONUS PDS, dependent travel is authorized from the employee's actual residence (i.e., the residence back home) or authorized constructive cost from a different location. JTR C7002-B.4.

G. Recoupment & Waiver of Claims. For a discussion of the interaction of Debt Collection Act of 1982 (5 U.S.C. 5514, 31 U.S.C. 3716), and recoupment under the travel and subsistence provisions, *see* 64 Comp. Gen. 142 (1984). The DOD Civilian Personnel Manual states:

> Waiver of Claims. Claims resulting from erroneous disbursement of pay and allowances may be processed in accordance with DOD 7000.14-R. The foreign post and special incentive differentials meet the definition of pay under 5 U.S.C. 5584.
>
> DOD 1400-25-M SC 1250.6.3 (other references omitted).

H. Transfers Between Agencies. When an employee transfers from one agency to another, the gaining agency pays the travel and transportation expenses. The exception is when the transfer is the result of a RIF or transfer of function, by agreement between the agency heads, either then gaining or losing agency may pay the expenses. This exception does not apply to "expenses authorized in connection with a transfer to a foreign country." 5 U.S.C. 5724(e).

1. Where the employee had return travel rights and travels before the transfer from one agency to the other is effected - then the losing agency funds the relocation expenses. 65 Comp. Gen. 900 (1986).

I. **Assignment to Overseas Location Where Dependents Are Not Allowed**. When an employee is assigned to an OCONUS location with "adverse conditions" where dependents are not allowed, the government will transport the employee's dependents "to an alternate location" designated by the employee or the dependents when it is impracticable to secure an employee's designation. JTR C12001-A & C, *citing* 5 U.S.C. 5725. The dependents and HHG may later be moved to the PDS if the restriction is moved as long as the employee has, or agrees to, 1 year at the station. JTR C12001-C. Otherwise, the dependents and HHG will be moved to the employee's follow-on PDS.

J. **Permanent Storage Expenses for Household Goods & Personal Effects**. 5 U.S.C. 5726(b); FTR §302-8.1. This is technically known as non-temporary storage (NTS).

1. New appointees and employees assigned to a permanent duty station (PDS) OCONUS may be allowed storage expenses and related transportation and other expenses for house-hold goods (HHG) and other personal effects, when - the duty station is one to which he cannot take or at which he is unable to use the items, or the head of the agency authorizes the storage as in the public interest or for reasons of economy. 5 U.S.C. 5726(b). NTS of HHG may be authorized in lieu of a HHG shipment when the employee is assigned to an OCONUS PDS to which HHG transportation is limited or where NTS is in the government's best interest or it is cost effective to do so. JTR C5154-A.2(b)-(c).

K. **Household Goods (HHG) Transportation**. FTR § 302-7; JTR C5150-5180.

1. Eligibility. Employees transferring between CONUS/OCONUS official duty stations, new appointees and employees returning to CONUS for separation following completion of an OCONUS assignment are all eligible for HHG transportation. JTR C5152.

2. When Must HHG Transport Be Authorized. The language in the JTR suggests that authorization for HHG transportation may be authorized before or after the move, but if not authorized "the costs become the employee's responsibility." JTR C5154-A.3 (what the instruction actually says is that the HHG move "may be authorized for a PCS before the PCS travel authorization is issued").

3. Maximum Weight. The maximum net weight for each employees is 18,000 pounds. JTR C5154-B. The items in storage count against the maximum weight allowed to be shipped. 5 U.S.C. 5726(b); JTR C5154-

B. The JTR emphasizes that, "***Under no circumstances may the Government pay any expenses associated with excess weight***." JTR C5154-B note (bold italics in original). But, when government furnishings are provided at OCONUS locations, HHG transportation at government expense "ordinarily is limited to 4,500 pounds net weight, not including unaccompanied baggage weight." JTR C5156-A. The provision on administrative weight limitations goes on to discuss exceptions to the 4,500 pound limit.

a. Like the military, civilian employees may ship professional books, papers and equipment (PBP&E), without the material counting against the maximum weight allowance. JTR C5154-C.1, .3. Having these papers recognized as such takes a bit of effort but is only necessary where the weight of the PBP&E will cause the employee's shipment to go over the allowed weight. The expense is shifted from a HHG transportation expense to an "administrative expense." JTR C5154-C.2. The weight and the administrative appropriation chargeable must be stated as separate items on the documentation used to transport the PBP&E. JTR C5154-C.3.c. In other words, the employee will have to get a fund cite from the gaining command and put the information separately listed on the bill of lading. Before the shipment occurs, the employee must furnish an itemized inventory of the materials for review by an official designated by the authorizing/ordering command. JTR C5154-C.2.a. The employee must furnish the evidence deemed necessary by the authorizing/order-issuing command that transport of the itemized materials resulted in an excess HHG weight. JTR C5154-C.2.b. Finally, at the new PDS, a person designated by the authorizing/order issuing authority must review and certify that the itemized PBP&E "are necessary for the proper performance of the employee's duties at the new PDS, and that if they are not transported to the new PDS, the same or similar items would have to be obtained (at Government expense) for the employee's use at the new PDS." JTR C5154-C.2.c.

4. Employee-Paid Expenses. Employees are responsible for paying transport costs when:

a. They exceed the authorized weight allowance, JTR C5154-F.2.a;

b. Items are transported between other than authorized locations, JTR C5154-F.2.b;

c. Items are transported that are not HHG. JTR C5154-F.2.c. HHG are defined at JTR Appendix A.

d. Transported in more than one lot, not included the unaccompanied baggage shipment, or expedited transport of items of extraordinary value. Note: this should not be mistaken for imposing additional costs for making a pickup from more than one location. JTR C5154-F.2.d.

e. Special services requested by the employee with the example given of increased valuation liability. JTR C5154-F.2.e.

f. Transport related costs incurred by the government due to the employee's negligence; the example given of not being present for a scheduled pickup or delivery. JTR C5154-F.2.f.

5. Pickup Points. The total amount paid by the government must not exceed the cost of transporting the HHG in one lot from the employee's last PDS (or the new appointee's actual residence at the time of appointment) to the new PDS. JTR C5154-I note.

   a. That said, HHG may be transported when:

      (1) The shipment originates at the employee's last PDS, the actual residence, or another point, JTR C5154-I.1;

      (2) Part of the shipment originates at the last PDS and the remainder at one or more other points, JTR C5154-I.2;

      (3) The destination is a new PDS or another point, JTR C5154-I.3; or

      (4) The destination for part of the HHG is the new PDS and the remainder is shipped to one or more other points. JTR C5154-I.4.

   b. OCONUS HHG transportation may be authorized between the same points as dependent movement. JTR C5180-B.1, *referencing* JTR C7002.

6. Re-Transport of the Same HHG. HHG returned to CONUS or the actual residence may be reshipped back to the OCONUS PDS during a continuous period of OCONUS employment under the following conditions: the situation was beyond the employee's control; and the moves were authorized or approved by the headquarters of the DOD agency. No new service agreement is required for shipping the HHG back to the OCONUS PDS. JTR C5158.

7. HHG Transport To & Between OCONUS PDSs.

   a. When the maximum HHG weight allowance is not shipped OCONUS during the initial tour, the employee may be authorized shipment of the HHG balance through renewal agreement for an additional tour at the same or different OCONUS PDS. JTR C5180-B.2.

   b. From OCONUS to CONUS PDSs.

      (1) HHG move to the employee's actual residence may be authorized at government expense incident to a PCS, separation or authorized advance transportation of dependents. JTR C5180-C.

      (2) Where the employee moves HHG back to the actual residence before the employee has completed the agreed period of service and an advance return is not authorized, then the employee is financially responsible for the move and government transportation facilities may not be used. JTR C5180-C.2.b.

L. Temporary Storage Expenses for Household Goods (SIT). This is known as storage in transit (SIT).

1. Eligibility. Employees transferring between CONUS/OCONUS official duty stations, new appointees, and employees returning to CONUS for separation following completion of an OCONUS assignment, are all eligible for SIT. JTR C5152.

2. SIT is short-term storage that is part of HHG transportation. Temporary storage/SIT may be at any combination of the origin, destination, and en route locations. SIT is not authorized for HHG moves between local quarters when no PCS exists. JTR C5190-A.

3. Duration. The maximum total time limit for SIT normally is 180 days. JTR C5190, *citing* FTR §302-7.8. The 180 day time limit is divided into an initial 90 day period which may be extended an additional 90 day period. JTR C5190-B.1. Note that at JTR C5154-F.1.c, it states that SIT should not exceed 90 days but C5190-B1 is the controlling provision providing for an extension up to a total of 180 days. SIT in excess of 180 days at Government expense cannot be authorized under any circumstances.

   a. The 180 day Limit.

      (1) "Acceptable justification" for SIT beyond the initial 90-day

period includes:

(a) An intervening TDY or long-term training assignment,

(b) Non-availability of suitable housing,

(c) Completion of residence under construction,

(d) Serious employee illness or a dependent's illness or death,

(e) Strikes,

(f) "Acts of God," "Similar reasons" and if they weren't bad enough, "Other circumstances beyond the employee's control."

JTR C5190-B2.

The Wisdom of the JTR: Given the capital "G" in God, presumably the for "similar" reasons were added in the JTR to cover acts by deities other than Yahweh such as Thor, Neptune or Zeus.

(2) Approval is by the employee's commanding officer or designated representative.

b. Extension Of The 180 Day Limit On SIT. JTR C5191 (effective August 25, 2005), *citing* GSA Waiver Memo (28 June 2005). The 180-day maximum SIT limit may be insufficient for employees on a PCS to a new PDS with en route TDY assignments to locations such as Iraq and Afghanistan. In such cases the PDTATAC may authorize extensions of the 180-day period for SIT for the duration of the TDY assignment plus 90 days on a case-by-case basis.

(1) Requests for SIT extensions must be submitted by the employee's agency/command to the Per Diem, Travel and Transportation Allowance Committee, T&T Branch.

4. SIT reimbursement cannot exceed the employee's actual storage costs. JTR C5190-C, *citing* FTR §302-7.107-110.

M. Transport of Motor Vehicles - Privately Owned Vehicles (POVs). Transportation of an employee's property does not include authorization to transport an employee's motor vehicle unless specifically authorized by

statute or regulation. 5 U.S.C. 5727(a). The basic authorization to ship a POV overseas is 5 U.S.C. 5722(a)(3), 5724(d).

Note: Agreements with European host nations may limit the number of POV's, including motorcycles, that members and their families may operate.

1. 5 U.S.C. 5727(b) provides a POV owned by an employee, new appointee, or student trainee, may be transported at Government expense to, from, and between the continental United Sates, or between posts of duty outside the continental United States when:

   - the employee is assigned to the post for other than temporary duty; and

   - the employing agency determines it is in the interest of the Government for the employee to have use of a motor vehicle at the post of duty.

   This authorization, which seems to cover all combinations of moves, has been interpreted to nonetheless limit POV moves to and from OCONUS. Employees hired OCONUS for their first duty in CONUS are not authorized to ship a POV at government expense; and OCONUS shipments of POVs are only authorized when the POV is to be used at an OCONUS PDS. JTR C4002-B.1.d, *referencing* C5212-A5 *noting* 5 U.S.C. 5727 *and referencing see* 68 Comp. Gen. 258 (1989). The examples given in the JTR are, "A traveler residing in Hawai'i, who was hired locally and is later transferred from the Hawai'i PDS to a CONUS PDS is not authorized POV transportation to CONUS. Similarly, a traveler residing in Hawai'i, hired locally for duty at a PDS in CONUS is not authorized transportation for a POV to CONUS." JTR C5212

2. An employee may transport only one motor vehicle during a 4-year period unless that the head of the agency concerned determines that replacement of the motor vehicle is necessary for reasons beyond the control of the employee and it is in the interest of the Government and authorizes in advance a replacement motor vehicle. 5 U.S.C. 5727(d).

3. Transportation of motor vehicles may be by commercial means if available at a reasonable rate or by Government means on a space available basis. 5 U.S.C. 5727(e).

4. Transportation of POVs is discussed primarily at JTR C5212 (covering when POV shipment is and is not authorized) and C5217 (delivery of the POV at port), and replacement POVs at JTR C5232.

N. The Foreign Transfer Allowance (FTA): Miscellaneous Expenses; Temporary Quarters Before Departing CONUS; and Lease Penalty Expense.

1. Statutory & Regulatory Structure. The statutory and regulatory structure for these three allowances are quite complex, the saving grace is that application of the ultimate rules is rather straightforward.

   a. The basic statutory authority for the FTA is 5 U.S.C. 5924(2)(A) which establishes a "transfer allowance for extraordinary, necessary, and reasonable subsistence and other relocation expenses (including unavoidable lease penalties) ... incurred by an employee incident to establishing himself at a post of assignment in - a foreign area ..." (Internal paragraph designation omitted, parenthetical comment in original). But the expenses are only reimbursed under the FTA if they are "not otherwise compensated for." 5 U.S.C. 5924(2). The "other relocation expenses" in the FTA, are already covered by the Miscellaneous Expense provision in 5 U.S.C. 5724a(f). Nevertheless, coverage of all four expenses is generally referred to as the FTA (even though the miscellaneous expense allowance for current employees comes from a different statute).

   b. While the Department of State DSSR covers all three expenses in detail, the place to start for DOD employees is the JTR. The JTR provides detailed coverage for the Miscellaneous Expense Allowance (MEA) for current DOD employees and otherwise refers the reader to the DSSR for the lease penalty expense, the pre-departure subsistence expense, and the Miscellaneous Expenses for new appointees whose first PDS is outside the United States.

      (1) FTA Lease Penalty Expense. JTR C5300-D *referencing* DSSR § 240.

      (2) FTA Pre-Departure Subsistence Expense. JTR C5352-B *referencing* JTR C1004, DSSR § 240.

      (3) MEA for current employees. JTR C5305

      (4) FTA ME for new appointees with first PDS outside the United States. JTR 5305-B.1 Note 2, *referencing* DSSR § 240 (MEA portion).

      There is little difference between the JTR C5305 and the DSSR § 240 MEA provisions and so only the JTR provisions will be dealt with in

the outline. Obviously, the DSSR provisions should be consulted when hiring a new appointee for a position outside the United States.

c. The FTA expenses "includ[e] costs incurred in the United States" prior to departure to a foreign PDS. 5 U.S.C. 5924(2)(A).

d. HSTA. The JTR and DSSR also discuss a "Home Service Transfer Allowance" (HSTA) for expenses incurred by an employee at a post of assignment in the United States. 5 U.S.C. 5924(2)(B); DSSR § 250. Provisions regarding the HSTA are similar to the FTA and are not otherwise addressed in this outline.

2. FTA Eligibility for Employees or Applicants In or Outside of the United States.

a. The FTA Pre-Departure Subsistence Expense "is allowable for DoD employees PCSing from a PDS in [the United States] to a PDS in a foreign area and for new appointees traveling from an actual residence in [the United States] to their first PDS in a foreign area." JTR C1004-C.3.a. The JTR emphasizes that, "***The subsistence portions of the FTA ... are only for expenses incurred in the CONUS or non-foreign OCONUS areas - not in the foreign area***." JTR C1004-C.3 (emphasis in original).

Note: TQSA covers subsistence expense for employees departing a FOCONUS PDS and covers the subsistence expense for employees on arrival at the FOCONUS PDS.

b. MEA. Although a current employees transferring from one FOCONUS PDS to a second FOCONUS PDS would meet all of the requirements of JTR C5305-A.1 - .4 for payment of MEA and is not included in the list of reasons for denying MEA at JTR C5305-B, the JTR nevertheless specifically limits MEA to "DoD employees PCSing from a PDS in [the United States] to a PDS in a foreign area and for new appointees traveling from an actual residence in [the United States] to their first PDS in a foreign area." JTR C1004-C.3.a.

c. The Lease Penalty Expense "is allowable for all DoD employees (including new appointees) PCSing to a foreign area PDS or between foreign country PDSs." JTR C1004-C.4.a (parenthetical comment in original).

3. FTA Pre-departure Subsistence Expense.

a. Transferring employees are eligible for the Pre Departure Subsistence Expense under the FTA. JTR C1004-B. The controlling authority is the DSSR. JTR C5352-D *referencing* DSSR § 240. The substantive portion of the regulation is the DSSR §§ 242.2.c and 242.3.

b. Purpose. A predeparture subsistence expense portion applicable to lodging, meals (including tips), laundry, cleaning and pressing expenses in temporary quarters for employee and each member of family for up to 10 days before final departure from a post in the United States to a post in a foreign area, beginning not more than 30 days after they have vacated residence quarters. Expense of local transportation is not allowable. DSSR § 241.2.c.

c. Defining the 10 Days. The ten days may be spent anywhere in the U.S. as long as employee or family members have not begun travel on orders and final departure from the U.S. post of assignment. An agency may permit an extension beyond 10 days for "unusual circumstances" causing delay, "One example of a reason to approve beyond the ten days may be if employee submitted application for passport/visa in a timely manner and still did not receive documents in time to proceed to the foreign area." DSSR § 242.3.c.

d. Amount. For an employee departing a post in the United States for a post in a foreign area the amount shall be determined according to the maximum per diem rate for the U.S. locality from which transferred (no matter if the 10 days are spent in another U.S. location) and according to family status, except that lodging taxes shall not be included in the amount of lodging expense subject to the maximum per diem rate cap but may be reimbursed separately. Agencies may choose to pay the amount according to the Partial Flat Rate Method or the Total Actual Subsistence Method. DSSR § 242.3.

   (1) The Partial Flat Rate Method includes the actual lodging expenses (up to the maximum per diem rate from the locality which transferred with the lodging taxes not included in the maximum rate) plus a flat amount for meals and incidental expenses. Receipts are required for lodging only. DSSR 242.3. The amount is computed as follows: for the first person 100% of the per diem rate for lodging (plus taxes) and 100% of the per diem rate for meals etc; for each additional family member 12 or over, the amount is 75% of the per diem rate for lodging and 75% of the per diem rate for meals etc; and for each additional family member under 12, 50% of the per diem rate for lodging and 50% of the per diem rate for meals etc. DSSR § 242.3.a.

(2) Actual Subsistence Method. Under this method the method of computing per diem remains the same except there is no breakdown between lodging and meal and incidental expense portions of per diem. Receipts are required for lodging and a certified statement (without receipts) is required for daily meals, laundry and dry cleaning. Lodging tax may be reimbursed separately. DSSR § 242.3.b.

e. The FTA Subsistence Expense is claimed using an SF-1190 and FTA Worksheet (DSSR 240), and in the Navy, filed with the HRO.

4. FTA Miscellaneous Expense Allowance (MEA). The MEA described at JTR C5305 is for current employees. New appointees whose first PDS outside the United States receive a nearly identical Miscellaneous Expense (ME) under the DSSR. JTR 5305-B.1 Note 2, *referencing* DSSR § 240 (ME portion). This outline addresses the MEA.

a. MEA Eligibility.

(1) MEA can be paid when four criteria are met:

(a) The move is a PCS;

(b) A TA is executed;

(c) The employee moves out of the old residence; and

(d) The employee establishes a new temporary or permanent residence.

JTR C5305-A.1 - .4, *citing* GSBCA 16018-RELO (August 15, 2003).

(2) The following employees are NOT eligible for MEA:

(a) Employees performing Renewal Agreement Travel (RAT) unless a PCS is authorized in conjunction with the RAT and the employee has discontinued residence at the old PDS and established a residence at the new PDS. JTR C5305-B.2.

(b) Employees assigned to an OCONUS PDS returning to their actual residence for separation. JTR C5305-B.3.

(c) Employees going to/from a training location who are

authorized dependent transportation instead of per diem or AEA under C4500. JTR C5305-B.4.

b. MEA Can Either Be Paid As A Lump Sum Or Itemized.

(1) Lump sum (i.e., no receipts are required). For an employee without dependents, the amount is $500 or one week's pay, whichever is less. For an employee moving with dependents, the amount is $1,000 or the equivalent of two weeks pay, whichever is less. JTR C5310-A.1, -B.1 - .2. Where the employee has dependents but the HHG and dependents are not relocated, MEA is $500 or 1 week's pay whichever is less, unless the dependents move and the other criteria are met within 2 years, then full MEA is authorized. JTR C5310-B.3.

(2) Itemized (requires receipts or other acceptable evidence justifying amounts claimed). The amount is capped based on the salary of the employee at the destination PDS. For an employee without dependents, the cap is either 1 week's salary or 1 week's salary for a GS-13 step 10, whichever is less. For an employee with relocating dependents, the cap is 2 weeks' salary or 2 weeks' salary for a GS-13 step 10, whichever is less. 5 U.S.C. 5724a(f); JTR C5310-C.

(3) When the MEA is Itemized, the following miscellaneous expenses that ARE covered, JTR C5310-D:

- Disconnecting & connecting appliances, equipment and utilities;

- Converting household equipment and appliances for use overseas including transformers;

- Cutting and fitting carpets, draperies and curtains moved from one residence to the other (not the cost of new rugs etc);

- Utility fees or contract deposits that are not offset by eventual refunds;

- Losses on non-transferable/non-refundable contracts for medical, dental, food lockers and private institutional care;

- Transportation of cats, dogs and other house pets (excluding horses, fish, birds, and various rodents because of their size,

exotic nature, or restrictions on shipping, host country restrictions and special handling difficulties), and required quarantine of pets (but not for the boarding of pets while preparing to move and during the move);

- Automobile registration, driver's license, taxes and bonds;

- Re-installation of catalytic converter (the cost for removing the converter is not mentioned);

- Required removal (e.g. tinted windows) or installation (e.g., special lights) of auto parts required by the host country law;

- Agent fees incurred for living quarters in a foreign area that are not offset by an eventual refund;

- Reassembly, set up and tuning of a piano;

- Fee for post office box rented to provide a constant mailing address during move; and

- Similar costs.

(4) Miscellaneous expenses that are NOT covered, JTR C5310-E:

- Losses in selling or buying real or personal property or costs related to such transactions;

- Costs which are otherwise reimbursable under another statute or regulation or covered by insurance;

- Costs for moving household goods in excess of authorized weight allowance;

- Increased cost of insurance for the HHG move;

- Cost for purchasing new items such as new rugs or draperies, or appliances;

- Costs incurred for reasons of personal taste or preference not required because of the move;

- Higher taxes (e.g., for income, real estate, sales) at the new post;

- Fines of other penalties (e.g., for violating traffic laws) imposed on the employee or dependents, or judgments, court costs or similar expenses;

- Accident insurance premiums or liability costs incurred in connection with travel or any other liability resulting form uninsured damages caused by accidents for which the employee or dependents are held responsible.

- Damage or loss of luggage or clothing or other personal items while traveling;

- Medical expenses en route;

- Costs of restructuring or remodeling quarters, garages, or buildings.

c. MEA is submitted on a travel claim along with a certification that the old PDS residence has been discontinued and a new PDS residence has been established. JTR C5310-F.

d. No Advance Payment. "An advance of MEA funds is not authorized." JTR C5300-B.

5. FTA Lease Penalty Portion. This portion of the FTA is to help offset the expense of a lease penalty unavoidably incurred by an employee. The amount of reimbursement shall not exceed the amount required by the specific terms of a rental contract signed by the employee as a prior condition of obtaining the lease, or the equivalent of three months' rent, whichever is less. DSSR § 242.4.

a. Transferring employees are eligible for the Lease Penalty Expense Portion under the FTA. JTR C1004-B. The controlling authority is the DSSR. JTR C5300-D *referencing* DSSR § 240.

b. Applicable to Employees Outside the United States. The FTA Lease Penalty Portion "is allowable for all DoD employees (including new appointees) PCSing to a foreign area PDS or between foreign country PDSs." JTR C1004-C.4.a (parenthetical comment in original). A lease penalty expense portion to assist employees either departing the U.S. or foreign area to help offset the expense of unavoidable lease penalties in the U.S. or a foreign area for the early termination of a lease due to transfer required by a Federal agency. DSSR § 241.2.d.

c. Required Certification. The authorizing official must certify in writing that:

a. the employee's transfer to a foreign post of assignment was due solely to actions by the employing agency and to unusual conditions fully beyond the control of the employee; and

b. the termination of the lease and departure of the employee did not result from any specific actions by the employee to seek a curtailment of the assignment for transfer or promotion; and

c. the employee was not negligent in promptly notifying the landlord of the intent to terminate the lease after receiving an official notice of transfer; and

d. all reasonable steps were taken by the employee to dispose of the quarters by sublease or assignment to others; and

e. both the employee and employing agency made reasonable efforts to avoid the full lease penalty by delaying the employee's transfer to a foreign post of assignment.

DSSR § 242.4.

d. How to File. Agencies have the option of using the SF-1190 for FTA claims or their own forms. DSSR § 245.2.

O. Temporary Quarters Subsistence Allowance (TQSA-Arrival) at the Foreign Destination. A part of the Overseas Differentials and Allowances Act, 5 U.S.C. 5923(a)(1)(A); JTR C1003, *referencing* DSSR § 120. For the "reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and family." See page 189 for a discussion of TQSA upon departure from an overseas PDS.

1. Terminology - The "temporary quarters allowance" in CONUS prior to departure for an overseas PDS is the Foreign Transfer Allowance (FTA). 5 U.S.C. 5924(2). Upon arrival at an overseas PDS the temporary quarters allowance is the Temporary Quarters Subsistence Allowance (TQSA-Arrival). 5 U.S.C. 5923(a)(1)(A). TQSA is also available on departure from the foreign PDS (TQSA-Departure). 5 U.S.C.

5923(a)(1)(B). While on return to the United States, the allowance is the Temporary Quarters Subsistence Expense (TQSE). 5 U.S.C. 5724a(c)(1)(A).

2. Purpose of TQSA. TQSA is intended to assist in covering the average cost of adequate but not elaborate or unnecessarily expensive accommodations in a hotel, pension, or other transient-type quarters at the post of assignment, plus reasonable meal and laundry expenses after first arrival at a new post of assignment in a foreign area or preceding final departure from the post. DSSR § 122.1. Allowance is for temporary quarters (including meals and laundry/dry-cleaning expenses) occupied after first arrival at a PDS in a foreign area. JTR C1003.

3. TQSA Eligibility. An employee qualifies for TQSA only if the employee is eligible for a Living Quarters Allowance (LQA). JTR C1003, *citing* DoD Civilian Personnel Management System Manual 1400.25-M, Subchapter 1250-E *and* DSSR Section 031.1. See discussion starting at page 131 for determining LQA eligibility.

4. Duration of TQSA. Paid for up to 90 days after first arrival at foreign post or until permanent quarters are occupied. 5 U.S.C. 5923(a)(1)(A); DSSR § 121.a. This period may be extended for not more than 60 additional days if it is determined "that there are compelling reasons beyond the control of the employee ... ." 5 U.S.C. 5923(b); DSSR § 122.2.

5. Standard TQSA - The amount of TQSA declines each 30 days.

   a. The First 30 Days. The employee (or initial occupant) gets 75% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 50% of the per diem and each additional occupant under 12 gets 40%. DSSR § 123.31.

   b. The Second 30 Days. The employee (or initial occupant) gets 65% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 45% of the per diem and each additional occupant under 12 gets 35%. DSSR § 123.32.

   c. The Third 30 Days. The employee (or initial occupant) gets 55% of the per diem rate for the post. Each additional family member occupant age 12 or over gets 40% of the per diem and each additional occupant under 12 gets 30%. DSSR § 123.33.

   d. Extension Period. It's the same as the Third 30 Day Period. The employee (or initial occupant) gets 55% of the per diem rate for the

post. Each additional family member occupant age 12 or over gets 40% of the per diem and each additional occupant under 12 gets 30%. DSSR 123.34, *referencing* § 123.33.

6. Alternative TQSAs.

   a. Agency Options. Instead of paying TQSA, the agency or post may choose to provide temporary quarters directly, to limit the number of days TQSA may be paid to fewer than the maximum number of days, and/or not to pay any TQSA if quarters with cooking facilities are provided. DSSR § 122.3.

   b. Employee Occupies No-Cost Temporary Housing. If the employee is able to occupy no-cost housing, then the employee will only receive actual meal, laundry and dry cleaning costs up to a maximum amount payable the first 30 days (75% of per diem for first person, 50% age 12 and over, and 40% for those under 12). DSSR §123.35, *referencing* §123.3.

   c. High Cost Lodging Locality. "In exceptional circumstances" when temporary lodging facilities are "extremely limited" and the costs "excessive" the head of agency may authorized no reduction in the costs for periods after the first 30 days. DSSR §123.36 *referencing* §123.31.

7. Definition of Family Member. A parent having executed a special power of attorney "granting guardianship" of his two children to his parents (the children's grandparents). The grandparents were an employee and spouse at an OCONUS PDS then assumed temporary custody of two grandchildren and sought an increase in their overseas allowances. The JTR, does not define "legal guardianship" so the GSBCA turned to Arizona state law (the state in which the power of attorney was executed) which provided that a legal guardianship can be established only by judicial determination. Since a legal guardianship did not exist, the grandchildren could not be members of the employee's immediate family and the employee was not authorized travel and transportation costs and overseas allowances (TQSA) on their behalf. GSBCA 16337-RELO (April 19, 2004).

8. Employees living on TQSA are not eligible for COLA. 5 U.S.C. 5924(1). Nor is an employee on TQSA eligible for a Post Allowance. DSSR § 127.

9. Submit an SF-1190 and a TQSA Worksheet DSSR 120. Hotel receipts are required along with a certification for meals and laundry expenses.

Receipts may be required for individual meals over a certain amount.

P. **Pay Status & PCS Moves**. A DOD employee is in a pay status either when involved in tasks that are a result from, or conditional to, a PCS move. The DOD Civilian Personnel Manual makes a distinction, without much of a difference, between personal tasks before and after the move such as opening or closing bank accounts, obtaining driver's license or car tags for which an employee may be granted excused absence, versus time involved in complying with PCS requirements such as obtaining passport and vaccinations, adhering to government housing authority requirements, being present for packing and receiving household good shipments - "[a]ccomplishing tasks that are conditional to the PCS is [sic, are] considered to be an official duty." DOD 1400.25-M SubChapt 630.7.4.3 (USD(P&R) December 1996, Change 17 January 8, 2004), *referenced in* JTR C1052-A Note 1. "Excused absence" is defined as "an authorized absence from duty without loss of pay and without charge to other paid leave." DOD 1400.25-M SubChapt SC 630.7.1.

Q. **When Does the Transfer Occur?** For current employees recruited outside the OCONUS geographic area, the transfer occurs when the employee reports at the OCONUS activity. JTR C4006-C.1.a. For those recruited locally, employment begins when the employee begins duty. JTR C4006-C.1.b. To avoid pay problems, employees should keep their time keepers aware of their travel plans.

XVII. ALLOWANCES, COMP TIME, HOLIDAYS & ANNUAL LEAVE AT THE OVERSEAS PERMANENT DUTY STATION.

A. **Allowances at the PDS After the PCS Move**. As is typical and frustrating in this area, the DOD Instruction doesn't state what allowances are available, rather, it directs the reader to another set of instructions, this time the Department of State Standardized Regulations (DSSR). DOD civilian employees living in foreign areas are authorized all of the allowances in the DSSR except for:

- The wardrobe portion of the Home Service Transfer Allowance;
- The wardrobe portion of the Foreign Transfer Allowance; and the
- Education allowance (but transportation of student family members is authorized).

DOD 1400.25-M SC 1250.5.1. Allowances specifically addressed in the DOD Civilian Personnel Manual are the:

- Quarters Allowance, commonly referred to as the Living Quarters Allowance or LQA;
- Post Allowance; and the,
- Education Allowance.

B. **Overseas Allowances - General Rules**. 5 U.S.C. 5922 - 5928 (Quarters allowance, Cost-of-living allowances, Post differentials, Compensatory time off at certain posts in foreign areas, Advances of pay, Danger Pay).

1. The employee must be a citizen of the United States officially stationed in a foreign area whose basic pay is fixed by statute or administratively in conformity with rates paid by the Government for similar work in the Continental United States. 5 U.S.C. 5922(a).

2. Advances on allowances are available. If entitlement to the allowances does not subsequently accrue, the agency may waive collection "if it is shown that recovery would be against equity and good conscience or against the public interest." 5 U.S.C. 5922(b).

C. **Post Allowance (PA)**. 5 U.S.C. 5924(1), 5941; DOD 1400.25-M "CPM" SC1250.5.1.2 (Dec. 1969); DSSR § 220.

1. How to Determine a Post Allowance.

   a. The employee needs to know their base salary and their family size (divided into 6 groups) with separate rules dealing with family members who are away from the post for education.

   b. Go to the web page for the Dept. of State Bureau of Administration (http://www.state.gov/m/a/als/), select "Table of Allowances (Section 920), select the location and find the number under the Post Allowance number (not labeled as such, this is the Post Classification Level with numbers from 0, 5, 10, 15, 20 ... 160).

   c. Return to the Dept of State Bureau of Administration, Office of Allowances web page (http://www.state.gov/m/a/als/) and select the DSSR, then go to section 220, and see the tables at section 229.1. The Post Allowance is derived from the table for number of the

employee's dependents, the employee's pay and the Post Allowance rate determined from the first step.

2. The PA is paid "to offset the difference between the cost of living at the post of assignment ... in a foreign area and the cost of living in the District of Columbia ... ." 5 U.S.C. 5924(1). PA does not include the difference in the cost of housing. DSSR § 221. The amount may not exceed 25 percent of the rate of basic pay. 5 U.S.C. 5941(a).

   a. PA is typically described in terms of a percentage, e.g. 5%, 10% - a description that masks the allowance's complexity. The concept for the PA is to allow employees in the foreign area to have the same "spendable income" as they would in Washington D.C. by making up for the higher costs of goods and services in the foreign area. DSSR § 222. The allowance is published by the State Department and are available at: www.state.gov/m/a/als/920 "Table of Allowances (§ 920)".

   b. "Spendable income" is that portion of basic compensation available for spending after deductions for taxes, gifts and contributions, savings (including insurance and retirement) and U.S. shelter and household utility expenses. DSSR §§ 222, 228.2.

   c. The comparative cost of living considers normal expenses of the employee at the post (including Exchange & Commissary purchases) and additional costs resulting from local climatic, health conditions and customs, compared to the costs for the same or similar items and conditions affecting government employees in D.C. Education costs are not considered in the mix. DSSR § 222.

      (1) These U.S. costs are based on national Consumer Expenditure Surveys conducted periodically by the Bureau of Labor Statistics of the Department of Labor. These Expenditure Surveys include the "basket of goods" that is sometimes mentioned with respect to the Post Allowance.

   d. With D.C. representing 100, the result is a "Cost of Living Index for Foreign Location" which is converted into 20 "Post Allowance Class" ranging from 5% - 160%. For example, a Cost of Living Index from 128 - 132 converts to the 30% Post Allowance Class, which is to say, the cost of living is 30% more expensive in the foreign area than D.C. DSSR § 228 (table).

3. Determination Authority. The Post Allowance provisions of the instruction do not specify who has authority to decide if an employee is

entitled to a post allowance. Accordingly, authority for this determination falls under the DOD CPM general grant of authority - "the authority to decide an employee's eligibility for an allowance ... is delegated to those officials with appointing authority who are responsible for administering the program and submitting the required reports. The authority may be redelegated." DOD 1400.25-M SC 1250.6.1.1 (Dec 1969).

4. Employee Eligibility. Employees must be "stationed outside continental United States or in Alaska whose rates of basic pay are fixed by statute ... ." 5 U.S.C. 941(a). The Post Allowance is payable to employees even though they may not be eligible for other allowances, e.g., LQA. Generally, the employee must be a full time employee. "Part-time, intermittent, and U.S. family member summer/winter hire employees are not eligible." DOD 1400.25-M "CPM" SC1250.5.1.2.1.

   a. There are special rules for wage grade employees and DODDs educators. DOD 1400.25-M "CPM" SC1250.5.1.2.2 & .5.1.2.3.

   b. Employees living on TQSA are ineligible for COLA. 5 U.S.C. 5924(1).

   c. An employee entitled to a cost-of-living allowance under section 5924 may not be paid a 5941(a) allowance. 5 U.S.C. 5941(b).

5. Initiation & Termination of PA. An SF-1190 "Foreign Allowance Application, Grant and Report" is submitted to start or modify PA.

   a. PA begins the date the employee is hired at the post if locally recruited, or when the employee arrives at the new post except that no PA is authorized as long as the employee or a family member is on TQSA. DSSR § 223.1.

   b. For an employee who is transferring from the overseas post, the PA terminates when the employee or family members begin TQSA, DSSR § 224.1.a; or if there is no TQSA, the date the employee begins travel for the transfer or a combined leave and transfer order. DSSR § 224.1.b.

   c. Eligibility for the Allowance Can Be Affected by Absences From the Post.

      (1) Employee Without Family - Absence from Post on Duty Assignments (TAD/TDY).

(a) PA continues while the employee remains in the foreign country. DSSR § 225.1a.

(b) PA continues for short absences from the post (up to 30 calendar days) unless the approving officer determines the grant should not continue. DSSR § 225.1.b.

(c) PA is terminated for on the 31st day of absence from the country on duty. DSSR § 225.1.b.

(2) Employee With Family - Absence from Post on Duty Assignments (TAD/TDY).

(a) As long as family member remains in the country, the PA continues but at the rate appropriate for the reduced family size. DSSR § 225.2.

(b) The PA can continue when the entire family leaves the country (unless the approving officer determines otherwise) for absences up to 30 calendar days. DSSR § 225.2.a.

(c) PA is terminated on the 31st day of absence from the country by the employee and the employee's family. DSSR § 225.2.a.

(3) Employee on Leave Unrelated to Transfer.

(a) When the leave includes travel per diem allowance, including home leave travel with return to the post authorized, the PA terminates the date travel begins. When one or more family members remain at the post and the employee is required to continue the usual living expenses, the PA continues but at the appropriate lower family size. DSSR 224.2.a.

(b) PA is terminated on the 31st calendar day of absence from the post on travel orders which don't provide per diem. DSSR § 224.2b.

D. Post Differential. Where the "conditions of environment [outside CONUS or in Alaska] ... differ substantially from conditions of environment in the continental United States" 5 U.S.C. 5925(a), 5941(a)(1).

1. May not exceed 25% of base pay. 5 U.S.C. 5925(a), 5941(a).

2. May also be used for an employee "stationed in the United States who is on extended detail to a foreign area." 5 U.S.C. 5925(a).

3. Is not typically available for duty stations in Europe. Is paid in Bahrain.

E. Overseas Quarters. An employee who is a citizen of the United States permanently stationed in a foreign country may be furnished, without cost to the employee, "living quarters, including heat, fuel, and light," in a government owned or rented building. 5 U.S.C. 5912. The statute does not provide a basis for claiming a quarters allowance independent of implementing regulations. *Aurich et al v. United States*, 786 F.2d 1126, 1128, 1986 U.S. App. Lexis 20033 (Fed. Cir. 1986) (Section 5912 "merely *permits* the Government to furnish housing under appropriate regulations; it does not *entitle* employees to housing." (emphasis in original)).

1. Government provided quarters are typically not available to DOD civil servants overseas.

F. Living Quarters Allowance (LQA). 5 U.S.C. 5923(a)(2); DOD 1400.25-M SC 1250.5.1; DSSR § 031.1.

1. How to Determine LQA. Go to the web page for the Dept. of State Bureau of Administration (http://www.state.gov/m/a/als/), select the Table of Allowances (Table 920) and proceed through the menu.

2. What LQA Covers. "A living quarters allowance for rent, heat, light, fuel, gas, electricity and water" is provided when government owned or rented quarters are not provided without charge to an employee in a foreign area. 5 U.S.C. 5923(a)(2).

   a. Initial Repairs, Alterations and Improvements to Privately Leased Residence - may only be paid under "unusual circumstances" and only if "approved in advance" and the "duration of the lease justify payment of the expenses by the government." 5 U.S.C. 5923(a)(3).

   b. Items not covered are garbage or trash pickup, telephone charges, TV services or taxes, cleaning, garden or lawn maintenance, storage, road taxes, or fees associated with participation in a utility tax avoidance program.

3. LQA is divided into Entitlement Groups. The lower the number of the group, the higher the maximum allowance.

a. Group 4 - Pay Grades GS-1 through GS-9 & Certain Blue Collar Grades.

(1) Employees who have 15 years of U.S. government service and are GS 7-9, WG 12-13, WL 10-11 or WS 1-10, may be placed in Group 3.

b. Group 3 - Pay Grades GS-10 through GS-13.

c. Group 2 - Pay Grades GS-14 and above.

4. Each Entitlement Group is Divided into Employees With and Without Family Member Rates.

a. Without Family Member Rates - employees who are single or unaccompanied get this rate.

b. Employees With 1 dependent (e.g., a spouse) at the overseas location qualify for the "with family" rate.

c. Employees With 2-3 dependents receive an additional 10% above the "with family" rate.

d. Employees With 4-5 dependents receive an additional 20% above the basic "with family" rate.

e. Employees with 6 or more dependents receive an additional 30% above the "with family" rate.

5. Limit on LQA. The maximum allowance or rate is the cap. LQA is the lesser of the cap or actual expenses.

6. Initiation of LQA Payments. File with the designated office (typically HRO) an SF-1190 "Foreign Allowance Application, Grant, and Report" and a DSSR 130 "LQA Annual/Interim Expenditures Worksheet," typically with a copy of the lease. At the same time, if the employee has been on TQSA, the employee needs to stop the TQSA.

a. Notification Requirements for Change In Circumstances. Employees are required to keep the office responsible for the LQA program informed of any significant changes in circumstances including departure of dependents from the living quarters or reductions in the rent being paid to the landlord. Failure to inform the agency of changes, particularly where it results in overpayments to the employee

which is then spent on personal items is a basis for disciplinary action. *Lloyd v. Army*, 99 M.S.P.R. 342; 2005 MSPB LEXIS 4285 (Aug. 2, 2005).

b. Reconciliation. At some point in the tour, the employee will need to reconcile the initial estimate provided for the LQA with actual expenditures (the utilities are the variable).

7. "Shared Quarters" - The "Sin Tax". Employees sharing quarters with one or more individuals who are not family members "may be reimbursed only for their portion of the total cost of the quarters." DOD1400.25-M SC 1250.5.1.1.3. In the example described, the member with LQA was sharing quarters with one non-family member. The "employee's fair portion of the total annual allowable expenses should be 50 percent." Whether the non-family member was actually contributing 50% of the cost of the quarters was not a factor in the example. The employee must list the person(s) they are sharing living quarters with or subletting to on the SF 1190 "Foreign Allowances Application, Grant and Report."

8. Purchasing Quarters Overseas - Personally Owned Quarters (POQ). LQA can be used to purchase property overseas. There is a "10-year cost recovery period for personally owned quarters." DOD 1400.25-M SC 1250.4.7. The annual amount of LQA is based on the purchase price or appraised value of the property, converted to U.S. dollars at the exchange rate in effect at the time of the purchase. Employees who own, or are purchasing POQ, are not eligible for additional quarters allowances for renting, if the POQ is within the employee's local area of work. DOD1400.25-M SC 1250.5.1.1.4.

a. After the 10 year purchase period, the employee can continue to receive LQA for utilities only.

9. LQA for DODDS Educators. There are special LQA rules for DODDS educators at DOD1400.25-M SC 1250.5.1.1.5 *referencing* 20 U.S.C. 901-907.

10. Determining LQA Rates. For each FOCONUS location an annual report of rents paid etc., is due through the Service and DOD to the State Department which sets the new LQA rate. New rates will also be established where there has been a dramatic change in the exchange rate between the dollar and the local currency.

11. LQA Determination Authority. The DOD CPM doesn't specify a single authority to determine LQA. Rather, the CPM specifies which official has authority to grant waivers for the different criteria described in DSSR

§§ 031.12b and 031.12c.

12. Granting LQA to State-Side Hires Is the Norm. Generally, economics dictate that only higher graded (GS-9 or above) positions are hired State-side; activities hiring applicants from the States have to pay PCS costs and typically provide LQA. Lower graded American are recruited overseas without PCS costs or LQA allowance and would be typically filled by dependents of sponsors or by "tourist" hires (the latter only if allowed by the host nation). Or, if a lower graded position is difficult to fill with local American applicants, the job would likely be converted to a position for host-national employees. The only controversy occurs when an American employee in a lower graded position (say, a GS-6) begins drawing LQA.

13. Overseas Hires & LQA. The determination of whether an overseas hire is entitled to LQA under the DOD CPM is controlled by provisions of the DSSR § 031.12, as supplemented by the DOD CPM - yes, its circular. DOD 1400.25-M SC 1250.5.1.1.1, *referencing* DSSR § 031.1 (which includes § 031.12), *supplemented by* DOD1400.25-M SC 1250.5.1.1.2.

    a. As related below, DSSR § 031.12(b) authorizes some flexibility for LQA determination; there is no similar provision allowing flexibility for granting TA for locally hired U.S. citizens. In other words, it is less onerous for overseas hires to qualify for LQA than for a TA.

    b. LQA may be granted to overseas hires under the following limited circumstances:

        (1) The employee's actual overseas place of residence is fairly attributable to employment by the United States; and

        (2) Prior to appointment, the employee was recruited in the States by the US government (including the Armed Forces), an international organization in which the United States Government participates, or a foreign government, and has been in substantially continuous employment by such employer with a transportation agreement; or

        (3) The overseas employee was required by the agency to move to another overseas area.

        DSSR § 031.12.

    c. BUT: LQA is not available, even if the employee moves, "[i]f the employee is joining a spouse at a new duty station who is eligible for

LQA. ... ." DOD 1400.25-M SC1250.5.1.1.2.7.

d. Requirement "a" (DSSR § 031.12.a) - The Employee's Actual Overseas Place of Residence.

(1) Full DSSR quote:

> "a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his/her employment by the United States Government."

(2) The DOD CPM emphasizes that employees must meet the requirements of this DSSR § 031.12a. DOD 1400.25-M SC 1250.5.1.1.2.

(3) By "actual place of residence" the DSSR is referring to where the person is actually living, not their home of record or legal domicile.

(4) Generally, it means that the person is overseas for employment reasons - if the person was overseas for some other reason, then the LQA wouldn't be necessary to recruit the person.

(5) Determination Authority. The DOD CPM provision does not state who makes this determination or who could grant a waiver and for that matter, neither does the DSSR § 031.12. Accordingly, the DOD CPM general provision for delegations would apply.

(a) If a head of agency determination is required, the authority is delegated to the Director, [DOD] Civilian Personnel Management Service (CPMS), who may redelegate the authority. DOD 1400.25-M SC 1250.6.1.3 (Dec 1996).

(b) If a head of agency determination is not required, then the DOD CPM delegates the authority "to those officials with appointing authority who are responsible for administering the program and submitting the required reports. The authority may be redelegated." DOD 1400.25-M SC 1250.6.1.1 (Dec 1996).

e. Requirement "b" (DSSR § 031.12.b) - substantially continuous overseas employment with the United States or a foreign government with the equivalent of a transportation agreement.

(1) The actual DSSR requirements are:

The applicant employee is overseas because s/he:

- was recruited in the United States or one of its possessions by:

  (a) the United States Government, including its Armed Forces;

  (b) a United States firm, organization, or interest;

  (c) an international organization in which the United States Government participates; or

  (d) a foreign government;

- and has been in substantially continuous employment by such employer;

- with provisions for return transportation to the United States or one of its possessions.

DSSR 031.12.b.

(2) Former military and civilian members "shall be considered to have 'substantially continuous employment' for up to 1 year from the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States" not counting unusual cases such as the early return of a dependent. DOD 1400.25-M SC 1250.5.1.1.2.1.

(3) Waiver. The DSSR allows this provision to be waived "upon determination that unusual circumstances in an individual case justify such action." DSSR § 031.12. DOD however, places limits on the waiver. In other words, it is possible to give LQA to a local hire overseas applicant even if they were not originally recruited in the United States, with substantially continuous employment, with an enumerated employer, with provision for return to the United States, when "unusual circumstances in an individual case" exist.

(4) DOD Limitations on Waiver. While the State Department exemption could apply to any local candidate where there are "unusual circumstances" the DOD Civilian Personnel Manual, DOD 1400.25-M SC1250.5.1.1.2.2, specifically limit this waiver to the following circumstances:

.1 The sponsoring spouse dies.

.2 The sponsoring spouse becomes incapable of continued employment with the government.

.3 The couple divorces or separates (either by initiating legal action to dissolve the marriage or "one separates from bed and board short of applying for a divorce.").

.4 "Sponsoring spouse left the post or area permanently."

.5 Spouses could not maintain a common dwelling due to the relocation of either spouse's work place.

.6 The locally hired employee encumbers a position designated as Emergency Essential (EE) iaw DOD Directive 1404.10.

- The ability to be paid the LQA allowance is effective only for the period during which the EE crisis exists. DOD 1400.25-M SC1250.5.1.1.2.2.

(a) Plus, in situations .1 - .5, the locally hired employee must have entered the country where the foreign post is located as the spouse of a sponsor eligible for LQA. DOD 1400.25-M SC1250.5.1.1.2.2.

(b) And, waivers for reasons .1 - .5 "shall last no longer than one year from the date eligibility is established" unless further extended by the appropriate Major Command. DOD 1400.25-M SC1250.5.1.1.2.2.2.

(c) And when the employee/applicant under consideration for the LQA accompanied or followed the sponsoring spouse to the foreign area and still resides with the spouse, then waiver of the DSSR 031.12b (requiring continuous overseas employment with the US or a foreign government) will not be made except where the sponsoring spouse becomes incapable of working for the government. DOD

1400.25-M SC1250.5.1.1.2.3, *referencing* SC 1250.5.1.1.2.2.2.

(5) Extent of Limitation on Giving LQA to Overseas Spouses. Read in isolation, one of the paragraphs discussing the LQA waiver seems to prohibit dependent spouses who are still residing overseas with their sponsor from qualifying for LQA anywhere in the world. But reading the provision in its context shows this is not the case - the prohibition only applies to local hires, that is, the LQA restriction only applies to the overseas country where the couple is stationed.

(a) The provision states: "Except ... [where the sponsoring spouse is physically or mentally incapable of employment, the] **waiver ... will not be made for a married employee who accompanied or followed his or her spouse to a foreign area and still resides with that spouse.**" DOD 1400.25-M SC 1250.5.1.1.2.3 (emphasis added).

(b) The provision seems to state that if dependent spouse was in "a foreign area," and that would be any foreign area, and still resides with the spouse, then she cannot qualify for LQA, presumably at all other overseas locations.

(c) Thus, for example, what of a couple in Spain where the military sponsor was retiring and the spouse was applying for a position in Italy and the military sponsor was still capable of employment? Could a hiring activity in Italy grant LQA if the dependent spouse was hired, given she had accompanied her spouse to a foreign area and still resides with the spouse? The answer should be that LQA can be granted because the restrictions in the waiver only apply to "locally hired" applicants and "locally hired refers to the country in which the [hiring] foreign post is located." DOD 1400.25-M SC 1250.3.4.

(d) First, the policy provision of the CPM makes relates that if "a person is already living in **the** foreign area," not any foreign area but **the** foreign area where the vacancy exists, then inducements such as LQA are "normally unnecessary." DOD 1400.25-M SC 1250.4.1 (emphasis added). So the policy concerns do not apply to applicants from around the globe but are limited to granting inducements such as LQA to applicants within the foreign country. Next, turning the Civilian Personnel Manual's

discussion of the waiver itself, it states, "Officials ... may waive [the] requirements for locally hired U.S. citizen employees" and then goes on to discuss the DOD limits on that waiver, the sponsoring spouse dies etc. DOD 1400.25-M SC 1250.5.1.1.2.2 (emphasis added). Thus the subsequent constriction to the exceptions on the DOD limits to the State Department waiver only exist in the context of a "locally hired U.S. citizen," that is, a spouse applicant in the same country where the vacancy exists.

Warning: Whether this analysis would be accepted by a determination authority in an actual situation is unknown.

(e) This interpretation is strengthened by the fact that if read in isolation, the provision leads to ridiculous results. The provision is that wavier "will not be made for a married employee who accompanied or followed his or her spouse to a foreign area and still resides with the spouse." DOD 1400.25 SC 1250.5.1.1.2.3. Note that the term used here is "spouse" not "sponsoring spouse" So, literally it would apply, say to a civilian sponsor who has LQA whose dependent spouse has accompanied the sponsor to the foreign area. And having completed their overseas tour, the sponsor would be ineligible for LQA at any other overseas position world-wide if the sponsor still resides with the dependent spouse.

(6) Determination Authority for Waiver. The DOD Civilian Personnel Manual delegates authority to the Secretaries of the military Departments among others. DOD 1400.25-M SC 1250.6.1.2. The CPM further provides that if the Major Command (MAJCOM) recommends approval of a waiver that it will go to the DOD Component Headquarters, e.g., to Navy Headquarters. But the Component Headquarters could redelegate authority back to the MAJCOM. DOD 1400.25-M SC 1250.5.1.1.2.2. The CPM also relates that the authority to decide an employee's eligibility for an allowance is "delegated to those officials with appointing authority who are responsible for administering the program and submitting the required reports. This authority may be redelegated." DOD 1400.25-M SC 1250.5.1.1.2.2, *referencing* SC 1250.6.1.1.

(7) When a waiver is granted, the "effective date of the LQA approval will be the date eligibility is established by the

approving official or the date quarters are occupied, whichever is later." DOD 1400.25-M SC1250.5.1.1.2.5.

(8) Example Where LQA Granted to Local Hire But TA Denied. Using the flexibility provided by DSSR § 031.12, the Navy's Office of the Assistant Secretary of the Navy (Manpower & Reserve Affairs) (ASN(M&RA)) granted LQA for an overseas local hire who was the dependent spouse of a retiring military member under the following circumstances. Granting the LQA was a recruiting incentive (the employee would not have taken the position without it and would have returned to the States), for a GS-14 unique position (there was only one at the command) that was normally filled by recruitment from the United States; recruiting the candidate saved the Navy two moves (returning the family to the United States and then bringing another candidate), and the candidate was the only applicant in the overseas area. At the same time, the lack of flexibility in the JTR prohibited a TA because he had accompanied his military spouse to the overseas area, the now retired military spouse retained return benefits to the United States, and the family did not meet any of the requirements under JTR C4002-B2(4) (the sponsoring retired military spouse had not left the service due to a physical or mental incapability, had not died, had remained in the local area and the couple had not divorced or separated). Letter, From OASN(M&RA) to Commanding Officer, NRCC Naples, Italy, "Living Quarters Allowance Waiver Request" (August 22, 2000).

f. Requirement "c" (DSSR § 031.12.c) - Granting an LQA after a move from an overseas location to a second overseas location.

(1) The DSSR 031.12 provision:

> "c. as a condition of employment by a Government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency."

As explained in the DOD Civilian Personnel Manual, requirement c, i.e., the granting of LQA, "shall be applied when management requests that an employee not now eligible for LQA relocate to another area. A management request that an employee relocate is considered a management-generated action." DOD 1400.25-M SC1250.5.1.1.2.6.

(2) Note: This requires more than a selection action from one overseas position to another overseas position. Rather, the employee must have been "required ... to move," for example (and probably, that is) the employee's billet is moved from one overseas location to a second overseas location (with the second location outside the commuting area of the first location).

(a) LQA then is unlike a TA where a move from one FOCONUS PDS to another FOCONUS PDS is grounds for a TA.

(b) Thus it is possible for an employee without a TA but having LQA in a FOCONUS PDS #1 who's position is transferred to another FOCONUS PDS #2 will retain LQA entitlement and pick up a TA entitlement, while an employee at FOCONUS PDS #1 without LQA or TA who applies for and is selected for a position in PDS #2, will get a TA but not LQA at PDS #2.

(c) "A move through a voluntary reassignment action is not considered a management-generated action" and thus LQA would not be available at the new location. DOD 1400.25-M SC1250.5.1.1.2.6.

(d) The DOD CPM applies the following test to see if an overseas move to another overseas location qualifies the employee for LQA at the new location. If the answer is yes to SC 1250.5.1.1.2.6.1, and .2 or .3 (below) applies, then LQA can be granted.

.1 Will employment be ended if the employee fails to accept relocation?

.2 Is the relocation caused by a management-generated action?

.3 Must management request an employee not now in receipt of LQA to relocate to another area?

DOD 1400.25-M SC1250.5.1.1.2.7.

(i) With regard to the first requirement, even if the employment wouldn't end if the employee refuses to move, "the DoD Component may approve LQA if a determination is made that there is no choice but to

move the employee for official reasons (e.g., mobility is inherent in the functional area)." DOD 1400.25-M SC1250.5.1.1.2.7.

(ii) With regard to the third requirement, "Selecting a person to be relocated is based on regulatory guidance, leaving management little option to recruit a new employee or select an employee receiving LQA." DOD 1400.25-M SC1250.5.1.1.2.7.

(e) "as a condition of employment" means that if the condition, "if not fulfilled, results in failure to gain or retain employment." DOD 1400.25-M SC1250.5.1.1.2.6.

(f) "another area" - "if an employee's new duty station is with the local area of work of the previously established residence, no LQA will be authorized." DOD 1400.25-M SC1250.5.1.1.2.7.

g. For NAF To Appropriated Fund Transfers, when the NAF employee was "eligible for [LQA] and related allowances upon their initial hire" and received the allowance for a year, upon transfer to an appropriated fund position, they continue to be eligible for the allowances. DOD 1400.25-M SC1250.5.1.1.2.9, *citing Angelo Raffin & Air Force*, CG B-184972, 1976 U.S. Comp. Gen. Lexis 2637 (May 5, 1976).

h. Determination Authority. "Head of agency" for DOD means the decision is made by the "appropriate Major Command." DOD 1400.25-M SC 1250.5.1.1.2.6. This authority may be redelegated to officials with appointing authority who are responsible for administering the program and submitting the required reports (which may in turn, be further redelegated). DOD 1400.25-M SC 1250.5.1.1.2.6, *referencing* SC 1250.6.1.1 (Dec 1996).

(1) Where two Major Commands or two Military Departments are involved in the move, "the gaining command will make the final determination [on whether LQA will be given]. The losing command, however, shall request an advance finding from the gaining command to advise the employee as to LQA benefit as a result of the movement." DOD 1400.25-M SC1250.5.1.1.2.8.

G. Education Allowance for Dependents. There is an extensive set of rules for an "education allowance or payment of travel costs" for "extraordinary and

necessary expenses ... incurred ... in providing adequate education for ... dependents" of overseas employees at 5 U.S.C. 5924(4); DOD 1400.25-M SC 1250.5.1.3.

1. How to Determine the Education Allowance. Go to the web page for the Dept. of State Bureau of Administration (http://www.state.gov/m/a/als/), select "Table of Allowances (Section 920), select the allowance is listed.

H. **Foreign Currency Appreciation Allowances**. 5 U.S.C. 5943. This allowance exists in statute. How and whether it is paid is unknown. This provision is not cited in the JTR.

1. There is an "arrangement approved by the President on July 27, 1933," providing "for the conversion into foreign currency of checks and drafts of employees and members of the uniformed services for pay and expenses" for annual appropriations. 5 U.S.C. 5943(b).

2. Where the July 27, 1933, arrangement is not used, agencies may meet losses sustained by employees and members of the uniformed services while serving in a foreign country due to the appreciation of foreign currency in its relation to the American dollar. 5 U.S.C. 5943(a) & (c). Allowances and expenditures under this section are not subject to income taxes. 5 U.S.C. 5942 (a).

3. The President shall report annually to Congress all expenditures made under this section. 5 U.S.C. 5943(d).

I. **Special Compensatory Time-Off**. In lieu of overtime, "on request of an employee serving in a foreign area" special comp time (my phrase) is available either where (1) the post is "isolated" and the employee is "performing functions required to be maintained on a substantially continuous basis" or (2) the employee is at a post "in a locality that customarily observes irregular hours or other special conditions." 5 U.S.C. 5926(a). The limitation is that the comp time earned may only be used "while the employee is assigned" to the post where it was earned and if not used, forfeited when reassigned. 5 U.S.C. 5926(b).

J. **Increase Accumulation of 45 Days Annual Leave**. American civil servants are normally limited to 30 days (240 hours) unused accumulated annual leave. 5 U.S.C. 6304(a).

1. This limit is raised to 45 days (360 hours) for:

a. Individuals directly recruited (e.g., a hire or transfer) in the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment. 5 U.S.C. 6304(b)(1).

b. Local hires with a Transportation Agreement. Employees originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment, who have been in "substantially continuous employment" by the United States, its interests, international organizations, or foreign governments, whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico. 5 U.S.C. 6304(b)(2)(A).

(1) With respect to LQA allowance, the DOD Civilian Personnel Manual relates that former military and civilian members "shall be considered to have 'substantially continuous employment' for up to 1 year form the date of separation or when transportation entitlement is lost, or until the retired and/or separated member or employee uses any portion of the entitlement for Government transportation back to the United States" not counting unusual cases such as the early return of a dependent. DOD 1400.25-M SC 1250.5.1.1.2.1.

c. Local "Tourist" Hires (my term), who were temporarily absent (for the purpose of travel or formal study) from their place of residence in the United States, or its territories or possessions including the Commonwealth of Puerto Rico, and who, during the temporary absence, have maintained their U.S. residence. 5 U.S.C. 6304(b)(2)(B).

d. Military members who are discharged from service **to accept employment with a federal agency** and who are not normally residents of the area concerned. 5 U.S.C. 6304(b)(3).

Warning: It is important that overseas military members who are separating or retiring keep contemporaneous records of their attempts to gain civil service employment in order to show that they "discharged from the service ... to accept employment with an agency" (5 U.S.C. 6304(b)(3)) in the event their entitlement to 360 hours of annual leave is called into question.

2. Individuals who don't meet these requirements are limited to accumulating 30 days of annul leave.

3. Use of Accumulated Leave. The employee retains the excess accumulation until used. The excess amount of annual leave will be reduced when the amount of annual leave the employee used during the preceding year in excess of the amount which accrued during that year. 5 U.S.C. 6304(c).

4. Restoration of Excess Leave. Congress anticipated the need to have leave restored both because employees would not be able to take leave on time or due to errors in accounting for leave.

   a. Per 5 U.S.C. 6304(d)(1), annual leave lost can be restored when:

      - administrative error resulted in a loss of annual leave otherwise accruable;

      - exigencies of agency business when the annual leave was scheduled in advance; or

      - sickness of the employee when the annual leave was scheduled in advance.

   b. By statutory definition, "exigencies" exist when a DOD emergency essential employee (designated under 10 U.S.C. 1580) in a combat zone (as used section [26 U.S.C.] 112(c)(2) of the Internal Revenue Code of 1986) loses leave by reason of such service regardless of whether such leave was scheduled. 5 U.S.C. 6304(d)(4).

   c. Restored excess leave will be put in a separate leave account for use by the employee within the time limits prescribed by the Office of Personnel Management (OPM). Per 5 U.S.C. 6304(d)(2), unused leave still available to the employee shall be included in the lump-sum payment under section 5551 (accumulated leave on separation) or 5552(1) (accumulated leave when entering active duty) but may not be retained to the credit of the employee under 5552(2) when the employee enters active duty.

K. Changes to Standard Work-Week and Holidays.

1. Background - Basic Rules For Working Sunday and U.S. Holidays.

   a. Sunday Premium Pay. American civil servants who work during a regularly scheduled 8-hour period which is not overtime, any portion of which is on Sunday, are entitled to premium pay for the entire 8-

hour period at the rate equal to 25% of the rate of basic pay. 5 U.S.C. 5546(a).

b. Holiday Premium Pay. American civil servants who work on an American holiday (not including work in excess of 8 hours or overtime work) are entitled to premium pay at a rate equal to the rate of the basic pay, i.e., employees gets double pay not counting overseas allowances. 5 U.S.C. 5546(b). An employee who is required to perform any work on a designated holiday is entitled to pay for at least 2 hours of holiday work. 5 U.S.C. 5546(c). "U.S. citizen employees who are required to work on an official U.S. holiday must receive appropriate premium pay. " DOD Civilian Personnel Manual, DOD 1400.25-M "Observance of Holidays in Foreign Areas" SC 1261.3.1.1. (Dec. 1996).

(1) Work in excess of 8 hours on a holiday is payable as regular overtime. Comp. Gen. B-216019 (Sept 21, 1984), *citing* 50 Comp. Gen. 519, 524 (1971).

(2) Compensatory time cannot be substituted for a GS employee when the GS employee is entitled to holiday premium pay. Comp. Gen. B-216019 (Sept 21, 1984), *citing* 5 U.S.C. 5543 (1982) (compensatory time), 5 U.S.C. 5546(b) (1982) (holiday pay), *and see generally* 53 Comp. Gen 264 (1973).

c. Authority to Schedule Work on U.S. Holidays. The DOD Civilian Personnel Manual expressly authorizes commanders to schedule work on U.S. holidays. "Due to mission requirements, both U.S. citizen employees and foreign national employees may be required to work on a day designated as a holiday with appropriate premium pay. " DOD 1400.25-M "Observance of Holidays in Foreign Areas" SC 1261.3.1.4. (Dec. 1996).

2. Observing U.S. Holidays Overseas Where Employees Work a Non-Standard Work Week. For employees overseas where there is a non-standard work week, holidays which are observed in the States on a Friday or Monday are instead observed on the first or last day of the non-standard work week, e.g., in Muslim countries where the observed work week is Sunday-Thursday with Friday and Saturday off, a Monday holiday would instead be observed on Sunday, while Thanksgiving Thursday would be celebrated on Thursday, the last day of the work week, giving the employees a three day weekend. The statutory language is:

a. "Instead of a holiday that occurs on a regular weekly non-workday of

an employee whose basic workweek is other than Monday through Friday, except the regular weekly non-workday administratively scheduled for the employee instead of Sunday, the workday immediately before that regular weekly non-workday is a legal public holiday for the employee. " 5 U.S.C. 6103(b)(2).

b. U.S. holidays that are designated to occur on a Monday "for an employee at a duty post outside the United States whose basic workweek is other than Monday through Friday, and for whom Monday is a regularly scheduled workday, the legal public holiday is the first workday of the workweek in which the Monday designated for the observance of such holiday ... occurs. " 5 U.S.C. 6103(b)(3).

3. Giving U.S. Employees On a Standard Schedule Admin Leave for Foreign Holidays. This is sometimes referred to as "Administrative Dismissal" or "Relieving Employees from Duty Without Charge to Leave or Loss of Pay."

a. This typically occurs where the base/activity/office/employee works on the host national schedule - the base/activity/office is open on U.S. holidays but closed on host-national holidays. As a result, the American citizen employees get holiday premium pay for working the U.S. holidays and are given admin leave when the base/activity/office is closed on the host national holiday. Otherwise, because the office is open on the US holiday, the employee would have to take annual leave to observe the U.S. holiday and have to take annual leave again when the office is closed for the host national holiday.

b. Criteria Are: "Duties of employees in the DoD unit or activity concerned consist largely of dealing directly with persons who are observing the holiday and there are no other duties (consistent with their normal duties) to which the employees can be assigned on the holiday. (Under most circumstances, duties shall be available, particularly in the case of holidays that are known well in advance.)" DOD Civilian Personnel Manual, DOD 1400.25-M "Observance of Holidays in Foreign Areas" SC 1261.3.3.3. (Dec. 1996).

(1) This provision does not mean just because you work in foreign country you get to take the host national holidays off. The provision only applies where the criteria in the provision are met, duties which "consist largely of dealing directly with persons who are observing the holiday and there are no other duties (consistent with their normal duties)."

(2) Note that the employee(s) duties "consist largely" of dealing with

persons observing host nation holidays. The provision isn't limited to U.S. employees who work "only" with others observing the host nation holiday.

(3) "Dealing with persons who are observing the [HN] holiday." The persons observing the HN holiday could be anyone the U.S. employee has to deal with, for example, it could be HN employees, co-workers following a NATO holiday schedule, contractor employees, host nation military personnel, host nation government offices etc.

(4) "there are no other duties (consistent with their normal duties) to which the employees can be assigned" - note the parenthetical comment. We can all find other work for employees to do, but to meet this criteria the alternate duties which might be assigned must be consistent with their normal duties.

(5) Regarding the proviso that since host-national holidays are known well in advance that other duties should be available -

(a) First note that this language does not preclude admin leave for host national holidays, only that normally an organization would ordinarily be able to come up with other duties.

(b) Next, the unit commander should be looking at the situation from a unit perspective, not necessarily position by position. Consider a NATO installation which is operating on a NATO schedule and base operations are closed on host national holidays, where the U.S. support element constitutes 10% of the overall workforce. It is perfectly appropriate for the unit commander to determine that the 10% as a group have no useful support to provide when the organizations they support are closed. Of course, if the commander wants to do a position-by-position determination, that could be done too.

c. Put Decision In Writing. Although not specifically required by the DOD Civilian Personnel Manual, the better practice is for the activity commander to document the decision in an "administrative order." Formalizing the process helps to ensure the criteria are met and avoids confusion as to which employees are affected.

d. A Long-Standing Practice. Although not well known even overseas, this is a long-standing practice.

(1) In 1937 the Comptroller General approved granting admin leave to Department of Agriculture employees assigned to diplomatic missions overseas. (The decision only covers personnel assigned to diplomatic missions.)

> By the terms of Executive Order 7013, April 16, 1935, amending instructions to diplomatic officers and consular regultions [sic], the chanceries of diplomatic missions and consular offices "may be considered [*6] as closed for the transaction of business of a routine nature" on all national holidays of the countries in which said missions or consular offices are located. Therefore, even if it be found that the Secretary of Agriculture has no general authority to excuse employees of the Department on local holidays, it would appear that when the diplomatic mission or consular office, to which a foreign agricultural attaché is attached, is closed by virtue of Executive Order 7013, then such attaché may be excused from duty without being charged with annual leave.
>
> Your conclusion is correct that there is no administrative discretion to excuse field employees from duty without charging annual leave solely on the ground that the days of absence are holidays local to the place of employment.
>
> However, there is no statute or Executive order precluding administrative action to close a field office on local holidays when Federal work may not be properly performed. Decision of August 28, 1937, A-88481, 17 Comp. Gen. 192. Such days would be “nonwork days established by administrative orders and not chargeable as annual leave. Employees paid on the basis of the year or month would be entitled to [*7] compensation for such days, but per diem employees and employees paid on the basis of "when actually employed” would not be entitled to compensation on such days of absence. 23 Comp. Dec. 106.

Secretary of Agriculture, 17 Comp. Gen. 298, 1937 U.S. Comp. Gen. LEXIS 355 (October 4, 1937).

(2) 1970 DOD Administrative Instruction. DOD Administrative Instruction No. 59 (Revised) “Observance of Holidays by OSD Field Activities” (OSD Administration & Management November 12, 1970).

(a) Applies to "overseas field activities of the Office of the Secretary of Defense, the Organization of the Joint Chiefs of Staff, and to other activities assigned to the OSD for administrative support," i.e., not to DOD component Service activities such as the Navy. ¶ 2.

(b) "Should the office remain open [on U.S. holidays], employees who work will be compensated at the holiday pay rate and employees who do not work will be granted holiday leave." ¶ 3.1.

(c) Admin Leave Provision:

> 3.2. Local holidays will be observed by closing offices and placing employees on administrative leave when Federal work may not properly be performed. Employees of the office must be actually prevented from working by one of the following circumstances:
>
> 3.2.3. The duties of the employees consist largely or entirely of dealing directly with employees and officials of business or industrial establishments or local government offices, and all such establishments are closed in observance of the holiday, and there are no other duties (consistent with their normal duties) to which the employees can be as signed on the holiday.

(d) This instruction requires an administrative order to be issued by the head of the overseas field activity. ¶ 4.

4. Giving U.S. Employees Admin Leave Due to Other Circumstances in the Host Nation. These would typically be one-time events. Citations are to DOD Civilian Personnel Manual, DOD 1400.25-M, SC 1261 "Observance of Holidays in Foreign Areas" (Dec. 1996).

a. It may be necessary to give U.S. employees administrative leave under the following circumstances "or under equivalent conditions." SC 1261.3.3.

(1) "The place of employment is closed physically by law or legal authority, or essential building services cannot be provided and it is not practical to make other arrangements to accomplish work (such as rescheduling the work for another day or providing alternate worksites)." SC1261.3.3.1.

(2) When public transportation is the principal mode of travel and those services are discontinued to the point where most employees are prevented from reporting to work, and it is not practical to make other arrangements to accomplish work. SC1261.3.3.2.

(3) The area Combatant Military Commander may determine a closure is appropriate when a local holiday or special occasion is of such significance that conduct of business by some or all offices under his or her jurisdiction would be an affront to the host-country government or not in the best interest of the United States. Such a holiday or occasion should extend to all elements in the society; that is, normal business ceases and most, if not all, business and government offices are closed in commemoration of the event. (Examples include a national day of mourning or a special celebration of a day of founding or independence; however, closure should not extend to the majority of the recurring holidays.) SC1261.3.3.4. The key requirements here are:

(a) that conducting business would be an affront to the host nation government or not in the best interests of the United States (the later part would cover situations where the host national government wouldn't officially take offense but the society at large would expect us to); and

(b) the holiday or occasion should extend to all elements of society.

5. No Swapping of US Holidays for Local Holidays. This is from the basic rules - if an American employee works a U.S. holiday, they have a statutory right to holiday premium pay; there is no statutory authority to take the 8 hours of holiday leave, say for the 4th of July, and "transfer" it to a host national holiday. The following Army letter on the subject is typical. "Although US citizens employees may be dismissed [given admin leave] on [foreign] local holidays, they must be given holiday premium pay when they work on US holidays. There is no authority to substitute local foreign holidays for US holidays nor to waive entitlement to holiday premium pay." Letter from Frank P. Cipolla, Assistant Chief of Staff, Personnel (Civilian Personnel), HQ U.S. Army Europe, and 7th Army to Commander, 21st SUPCOM, Subject: "Observance of Holidays by US Citizen Employees" (May 19, 1980).

XVIII. RULES AFFECTING OVERSEAS TRAVEL.

A. Modes of Air Travel.

1. The Fly America Act. The statute simply provides that agencies "shall take necessary steps to ensure" that air travel is "is provided by an air carrier holding a certificate under section 41102" if the air carrier is "available, if the transportation is between a place in the United States and a place outside the United States," 49 U.S.C. 40118(a)(3)(A), and "reasonably available, if the transportation is between two places outside the United States." 49 U.S.C. 40118(a)(3)(B) (emphasis added) (previously codified at 49 U.S.C. 1517 (1988). Finally, the Act provides exemptions from its application employees the Department of State and the Agency for International Development. 49 U.S.C. 40118(d). Thus, it is left to GAO and the agencies to determine what constitutes what is "reasonably available" for overseas travel. The result is a set of rules that are onerous to say the least and miserably fail the "bright-line" test.

   a. Purpose of the Act.

      (1) The "purpose of the Fly America Act as shown by its legislative history was to help improve the economic and competitive position of the U.S.-flag carriers against the foreign air carriers." Fly America Act - Code Sharing - Transportation by U.S. Carrier, B-240956, 70 Comp. Gen. 713; 1991 U.S. Comp. Gen. LEXIS 1113 (Sept. 25, 1991), citing see 57 Comp. Gen. 401, 403 (1978).

      (2) The Comptroller General "places a high degree of responsibility on the Government traveler to schedule his travel for the benefit of United States air carriers." *Norberg*, 59 Comp. Gen. 223, 1980 U.S. Comp. Gen. LEXIS 190 (Jan. 23, 1980), *citing In the Matter of the Fly America Act*, 56 Comp. Gen. 216, 1977 U.S. Comp. Gen. LEXIS 205 (Jan. 3, 1977).

      (3) "The purpose behind section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 is to counterbalance the advantages many foreign airlines enjoy by virtue of financial involvement and preferential treatment by their respective foreign governments. The clear intent of Congress was that United States Government-financed foreign air transportation be accomplished by [U.S.] carriers to the extent possible. Thus, where a traveler is faced with a choice between several different schedules, all of which involve the use of [U.S.] air carriers, the intent of Congress is best carried out by his selection of the schedule which makes the greatest use of [U.S.

air carrier] service." *In the Matter of the Fly America Act*, 55 Comp. Gen. 1230, 1976 U.S. Comp. Gen. LEXIS 107, at 5 (June 30, 1976)

Note: The pain to civil service travelers by what is referred to as the "Fly America Act" is largely ameliorated by three factors in Europe:

- there are few, if any, American carriers flying point-to-point within Europe;

- foreign airlines partnered with U.S. airlines are counted as U.S. airlines for purposes of Act; and

- the JTR now has a specific note providing for direct travel between Europe and Asia thus ending the insanity of travel offices requiring such travel via CONUS.

b. Penalty for Failure to Comply. If the traveler uses an "unauthorized/unapproved" foreign carrier when a U.S. carrier was available for a leg of a journey, then the traveler cannot be reimbursed for the leg of the journey, and if a U.S. carrier was available for an entire trip then "the transportation cost on the foreign air carrier is not payable." JTR C2204-D, *referencing* 41 C.F.R. 301-10.143.

c. U.S. Carriers Flights Code-Sharing On Foreign Airlines. The Comptroller General determined that traveling on a foreign airlines with a code sharing arrangement with a U.S. carrier met the requirements of the Fly America Act, as the U.S. airline is essentially leasing seats on the foreign carrier aircraft. *Fly America Act - Code Sharing - Transportation by U.S. Carrier*, B-240956, 70 Comp. Gen. 713; 1991 U.S. Comp. Gen. LEXIS 1113 (Sept. 25, 1991). The Comptroller General reasoned, "that there is no language in the Fly America Act specifying that air transportation must occur 'on' aircraft of any particular registry, but simply, that the air transportation must be provided by a U.S. air carrier." *In the Matter of Fly America Act*, B-240956, 70 Comp. Gen. 713; 1991 U.S. Comp. Gen. LEXIS 1113 (Sept. 25, 1991). The Comptroller General had the following criteria for accepting the practice:

- That the American carrier "receives a substantial portion of the revenue; it does not act as a mere booking agent on behalf of the foreign carrier," and,

- The "the entire ticket must be issued by the U.S. carrier [the factual premise for the decision was that both the American and

foreign carrier each had separate numbers for the flight]. It follows, in our view, that the government's payment should be made to the U.S. carrier."

In the Matter of Fly America Act, B-240956, 70 Comp. Gen. 713; 1991 U.S. Comp. Gen. LEXIS 1113 (Sept. 25, 1991).

d. The Key Issue is Availability of a U.S. Carrier. The JTR pretty much ignores the statutory distinction between flights from the U.S. to a foreign location be "available" while U.S. carrier flights between two foreign locations must be "reasonably available" and simply focuses on the question of whether a U.S. carrier is "available."

e. The JTR states a "U.S. flag air carrier service **is available** if:"

- the U.S. carrier "performs the commercial foreign air transportation required," and

- the U.S. carrier service accomplishes the mission, even though:

  -- the foreign carrier costs less [so much for spending money like it was your own], or

  -- is preferred by the service or the traveler, is more convenient for the service/ traveler, or

  -- the only U.S. flag air carrier service available between points in the U.S. and points outside the U.S. requires boarding/ leaving the carrier between midnight and 6 a.m., or travel spanning those hours [so much for the avoiding travel between 2400 - 0600]. If traveling on the U.S. carrier results in travel between 2400-0600 then the JTR generously allows that the "the traveler may have a brief non-work period not to exceed 24 hours, for 'acclimatization rest' at destination as well as per diem during the rest period when the destination is other than the traveler's PDS. JTR C-2204-C.1.b(4), *citing* 56 Comp. Gen. 629 (1977). Note, this is only for travel originating in the U.S. and going for a foreign destination - the rule is different when the travel originates in a foreign location.

JTR C2204-C.1 (emphasis added).

- There is a direct/non-stop U.S. flag air carrier offers nonstop/direct service (no aircraft change) from origin to destination, unless such

use would extend travel time, including delay at origin, by 24 hours or more. JTR C2204-C.2.f.

f. The JTR states that "U.S. flag air carrier service **is not** available" when:

DELAY

Note: The rules involving delay in transit between a U.S. and foreign carrier can be summarized as the "6-4-2, or <3 x 2 Rule." A U.S. carrier is unavailable if it involves: 6 or more hours flight time, 4 or more hours at an OCONUS terminal, or the number of F-OCONUS aircraft changes increases by 2 or more, or the trip on a foreign airline is less than 3 hours and going by a U.S. carrier would at least double the en route travel time.

(1) The Primary Rule Involving Delay is where "a U.S. flag air carrier does not offer nonstop/direct service (no aircraft change) between origin and destination," then a U.S. flag air carrier must be used on every portion of the route where it provides service unless, when compared to using a foreign air carrier, such use would:

(a) Increase the number of foreign OCONUS aircraft changes made by 2 or more; or

(b) Extend travel time by at least 6 hours or more; or

(c) Require a connecting time of 4 hours or more at a foreign OCONUS interchange point.

JTR C2204-C.2.g.

(2) Trips of Less Than 3-hours & Double Travel Time. "Foreign air carrier service would be three hours or less, and U.S. flag air carrier use would at least double en route travel time." JTR C2204-C.2.d. Note that this exception requires that the flight on the foreign carrier must be three hours or less not that it be three hours less than the U.S. carrier service - and, note the "and," the foreign carrier flight must be three hours or less AND the U.S. flag carrier would double the en route travel time.

(3) A Direct U.S. Flight & 24 Hour Delay. If a U.S. carrier offers nonstop/direct service (no aircraft change) from origin to destination, the U.S. carrier "MUST be used unless such use would extend travel time, including delay at origin, by 24 hours

or more." JTR C2204-C.2.f. This provision would apply where the U.S. carrier operates less than a daily service.

(4) Two Days of Excess Per Diem. "The total delay, including delay in initiation of travel from a TDY point, in en route travel and additional time at the TDY station before the traveler can proceed with assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred if non-certificated service was used." JTR C2204-C.2.l, *citing* 56 Comp. Gen. 216 (1977).

LATE OCONUS DEPATURE OR TRAVEL

(5) Overseas Departure Between 2400-0600 Hours. A U.S. flag air carrier is not available if "the only U.S. service between foreign OCONUS points requires boarding/leaving the carrier between the hours of midnight and 6 a.m., or travel spanning those hours," and a foreign "carrier is available which does not require travel at those hours," but "the traveler may [only] travel by [a foreign] carrier to the nearest practicable interchange point on a usually traveled route to connect with a U.S. flag air carrier ... ." JTR C2204-C.2.m, *citing* 56 Comp. Gen. 629 (1977).

LEGS - US CARRIER IS NOT AVAILABLE WHEN IT IS NOT AVAILABLE

(6) A U.S. carrier is not available if no U.S. flag air carrier provides service on a particular leg of the route, but the traveler can remain on the foreign carrier only to or from the nearest interchange point on a usually traveled route to re-connect with U.S. flag air carrier service. JTR C2204-C.2.b, *citing Norberg*, 59 Comp. Gen. 223, 1980 U.S. Comp. Gen. LEXIS 190 (Jan. 23, 1980).

(a) In Mr. Norberg's case, he was traveling from Austria back to the U.S. and discovered his Pan Am flight had been cancelled and he was put on a foreign airline to London where he transferred back to a Pan Am flight. The rule stated in *Norberg* is, "Where, because of mechanical or other difficulties, a United States air carrier reroutes an employee's travel aboard a foreign air carrier, United States air carrier service may be considered unavailable. Insofar as the traveler is given a choice as to substitute service, he should of course reschedule his travel by United States air carrier if to do so will not unduly delay his travel. These

principles apply to involuntary re-routings that occur enroute as well as upon initiation of travel." *Norberg*, at 4. Here were the conditions under which the Comptroller General authorized payment of his air fare from Austria to London: "At the date of Mr. Norberg's travel, Pan American was the only United States air carrier serving Vienna and the afternoon flight on which he had reservations was the last United States air carrier departing that day. Because connecting service by way of Frankfurt, Germany, similarly was not available that day, Mr. Norberg's travel by foreign air carrier to London was proper even if he was provided a choice as to substitute service. Under the circumstances, London was the nearest practicable interchange point to connect with United States air carrier service." *Norberg*, at 4-5.

INVOLUNTARY RE-ROUTE.

(7) A U.S. flag air carrier involuntarily reroutes the travel onto a foreign air carrier - but if the traveler is given a choice as to substitute service, a U.S. flag air carrier should be selected if it does not unduly delay the travel. JTR C2204-C.2.c, *citing* 59 Comp. Gen. 223 (1980).

BILAT AGREEMENT, FOREIGN FUNDING, or NON FEDERAL SOURCE.

(8) A U.S. carrier is not available if:

(a) Transportation is provided under a bilateral/multilateral air transportation agreement to which the U.S. Government and the government of a foreign country are parties, and which the Department of Transportation has determined meets the requirements of the Fly America Act. JTR C2204-C.2.a.

(b) Air transportation on a foreign flag air carrier is paid in full directly, or will later reimbursed, by a foreign government, an international agency or other organization. JTR C2204-C.2.e, citing B-138942 (Mar. 31, 1981), 57 Comp. Gen. 546 (1978))

(c) The traveler's transportation is paid for in full by a non-Federal source in accordance with the Joint Ethics Regulation (JER), DoD 5500.7-R. JTR C2204-C.2.n.

EMERGENCY TYPE SITUATIONS

(9) A U.S. carrier is not available if:

(a) "Foreign air carrier use is necessary for medical reasons, (including use to reduce the number of connections and possible delays when transporting persons needing medical treatment)." JTR C2204-C.2.i (parenthetical comment in original). Note that this exception does not require that the person making the travel be the sick or injured person.

(b) "Foreign air carrier use is required to avoid an unreasonable safety risk (e.g., terrorist threats)." JTR C2204-C.2.j (parenthetical comment in original). The threat could either be against the U.S. flag carrier or against government employees or other travelers. Threats against the US carrier must be supported by a travel advisory notice issued by the Federal Aviation Administration and the Department of State. Determination, and foreign air carrier use based on a threat against travelers must be supported by evidence of the threat(s) that forms the basis of the determination and authorization/ approval. JTR C2204-C.2.j Note.

THE JTR DILEMMA - U.S. FIRST CLASS TRAVEL v. FOREIGN AIR CARRIER.

(10) A U.S. carrier is not considered available if the U.S. carrier has only first class seats left and a foreign carrier has less than first-class available. JTR C2204-C.2.k

CATCH-ALL - THE AO DETERMINATION

(11) A U.S. carrier is not available if the "AO determines that a U.S. flag air carrier cannot provide the needed air transportation, or cannot accomplish the mission." JTR C2204-C.2.h. The JTR provides no guidance on criteria the AO should use in making this determination.

(a) When the AO determines U.S. flag air carriers are unavailable, documentation explaining why must be provided to the traveler. Endorsements on the travel authorization and/or Government travel procurement document, made in accordance with Service regulations, are acceptable. The documentation should include the

name of traveler, foreign flag vessel(s) or air carrier(s) used, flight identification no(s), origin, destination and en route points, date(s), justification, and authorizing/ approving official's title, organization and signature. JTR C2204-C.3.

g. Travel Between Asia & Europe. This is really a subset of the "6-4-2 rule" but in response to the plain (and likely institutional) misapplication of the JTR provisions implementing the Fly America Act it was (and perhaps remains) fairly typical of transportation offices in Europe to send employees and their families transferring from Europe to Asia via CONUS even though the travel distance flying direct to Asia was a substantially shorter and took less time. Since September 6, 2005, the JTR now has a specific Note stating that "***The 'Fly America Act' does not mandate travel across the CONUS when traveling between two OCONUS locations (e.g., Travel from Europe may be routed in an easterly direction to Asia instead of west via CONUS. When it is determined that a U.S. flag air carrier is or was not reasonably available for the most direct route between two OCONUS locations, use of a foreign flag air carrier may be authorized or approved ... .)***" JTR C2204-C (emphasis in original), *citing adopted from Satsky,* 16632-RELO, 2005 GSBCA LEXIS 123 (GSBCA July 15, 2005).

(1) Mr. Satsky, an Air Force employee, was being transferred from Ramstein Air Base, Germany to Kadena Air Base, Japan. According to its standard practice, the Ramstein transportation office offered Mr. Statsky and his wife tickets "for a flight west, with connections in the United States, on United States flag carriers, the Satskys' air travel would have taken 27.5 hours -- thirteen hours more than the flight east consumed. (According to on-line airline ticketing services, these numbers are both understated -- the former by less than an hour and the latter by several hours. Whether we use the agency's numbers or the on-line services', the result is the same.)" *Statsky*, at 2-3. Instead, contrary to his orders, Mr. Statsky purchased tickets for a direct flight heading east.

(2) The GSBCA found for Mr. Statsky. The Board noted that one of the exceptions to the Fly America Act is "for travel 'solely outside the United States' when a United States flag carrier provides service between the origin and destination: 'When compared to using a foreign air carrier, [use of a U.S. flag carrier] would extend [the employee's] travel time by 6 hours or more.' 41 CFR 301-10.137(b)." Turning to the JTR, the Board

found it stated, "that when the use of a United States flag air carrier would extend travel time by at least six hours, United States flag air carrier service is considered to be unavailable. JTR C2204-C.1.g." *Statsky*, at 4-5.

(3) The "satisfactory proof . . . showing the necessity for the transportation" is, as allowed by the FTR, that flying this route on a United States flag carrier would have taken thirteen more hours than flying on a non-flag carrier. Because the regulatory exception is met, reimbursement of the cost of the transportation, up to the amount of the least expensive unrestricted economy airfare available for scheduled commercial air service over the route, is appropriate. *Statsky*, at 5, *citing see* JTR C2206-C, -E.

h. Maximizing Use of U.S. Carriers. "Schedules maximizing U.S. flag air carrier use must be selected." JTR C2204-C.4. The example in the JTR focuses on situations overseas where U.S. carriers are available for only part of the travel leg - but the rules also apply to travel between the U.S. and overseas. Although not specifically stated in the JTR, the requirement to maximize use of U.S. carriers is subject to the rules on "availability" discussed above.

(1) The Rules.

(a) Where a U.S. flag carrier is available at the point of origin, it must be used if it provides service by a usually traveled route between origin and destination. JTR C2204-C.4.a(1).

(b) Where a U.S. flag air carrier is not available at origin or an interchange point, a foreign carrier should be used only from point of origin to the nearest practicable interchange point on a usually traveled route to connect with a U.S. flag air carrier for travel toward the destination. JTR C2204-C.4.a(2).

(c) For travel between the United States and another continent, travel should be routed so that available U.S. flag air carriers are used, i.e., the traveler should not accept a schedule where the traveler is at a location where there is no choice but to use a foreign carrier when an U.S. carrier could have been used. JTR C2204-C.4.a(3).

(2) The Example. The JTR provides an example of 4 alternate routes for a trip between Ankara, Turkey, and Stuttgart,

Germany, with all plane changes taking place in Europe. Schedule I involves two foreign carriers with 1 plane change; Schedule II involves a U.S. carrier departing Ankara to Rome with one plane change with a foreign carrier to Stuttgart; Schedule III involves a departure on a U.S. carrier with 2 additional legs, one a U.S. carrier to Frankfurt, Germany, and the trip finished on a foreign carrier; and Schedule IV with departure on a foreign carrier with two additional legs, one on U.S. carrier and the trip completed on a foreign carrier.

(a) Following the Maximum Use Rules the traveler is:

- Limited to Schedules II or III (because a U.S. carrier is available at the point of origin, JTR C2204-C.4.a(1)) and between Schedules II and III, schedule III should be selected because schedule III gets the passenger furthest on the U.S. carriers (as far as Frankfurt, Germany on Schedule III, but only as far as Rome in Schedule II;

- And, if limited to schedules I and IV (both with departure on a foreign carrier) schedule IV should be used because it involves one leg with a U.S. carrier while Schedule I offers none (under rule JTR C2204-C.4.a(2)).

JTR C2204-C.4.b Example, *citing see* 55 Comp. Gen. 1230 (1976).

(b) Note that the JTR Example does not follow the "6-4-2" availability rule at JTR C2204-C.2.g described above. Applying the availability rule, the traveler would be allowed to use the much more convenient and shorter Schedule I trip on foreign carriers. This is because Schedules II and III with U.S. carriers extend the travel time by six hours or more (JTR C2204-C.2.g(2)), and while Schedule IV is "only" 4:50 hours longer than Schedule I, Schedule I has only 1 foreign OCONUS aircraft change while Schedule IV has 3 foreign OCONUS aircraft changes and thus the "2" exemption in the "6-4-2 rule" applies (JTR C2204-C.2.g(1) authorizing foreign carriers when use of a U.S. carrier increases the number of OCONUS aircraft changes by 2 or more), and Schedule IV also requires a 5:00 hour connecting time at a foreign OCONUS interchange point and thus the "4" exemption in the "6-4-2

rule" applies (JTR C2204-C.2.g(3) authorizing foreign carriers when use of a U.S. carrier requires a connecting time of 4 hours or more at a foreign OCONUS interchange point).

(c) So how do we know the "Maximizing Use" rule doesn't over-ride the "6-4-2" availability rule? Because the "Maximizing Use" rule and the example still in the JTR came from the cited Comptroller General decision, 55 Comp. Gen. 1230 (1976). In 1976 the "6-4-2" rule didn't exist, instead it was more akin to the "12-6-__" rule, and the Comptroller General issued the decision in order to provide clarification to their original guidance and cover how an employee should choose between available competing schedules, e.g., Schedule II and III that otherwise met regulatory requirements as they existed in 1976.

2. Modifying Orders After The Fact. *Satsky*, 16632-RELO, 2005 GSBCA LEXIS 123 (GSBCA July 15, 2005). The Comptroller General and the GSBCA allow travel orders to be modified after the fact, including authorization to purchase otherwise allowable air fare on foreign flag airlines.

> "The Board has held that travel orders may be amended, after travel has occurred, 'when the facts and circumstances clearly demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence.' *E.g., Carl A. Wagner*, GSBCA 15896-RELO, 02-2 BCA P 32,038 (*quoting Thomas A. McAfoose*, GSBCA 15295-RELO, 00-2 BCA P 31,009); *see also Thelma H. Harris*, GSBCA 16303-RELO, 04-1 BCA P 32,540 (2003); *Alice P. Pfefferkorn*, GSBCA 14124-TRAV, 97-2 BCA P 29,313. We have also said, following a principle established in decisions of the Comptroller General (our predecessor [*7] in settling claims involving travel and relocation expenses of federal civilian employees), that travel orders may be amended retroactively 'if the original orders do not conform to applicable statute and regulation.' *Brian P. Byrnes*, GSBCA 14195-TRAV, *et al*., 98-1 BCA P 29,535.
>
> "A variant of the latter exception to the general principle that travel orders may not be amended retroactively applies here. Under applicable regulations, which are permitted by statute, when use of a United States flag air carrier would take an excessive amount of time, such a carrier is deemed unavailable. Where that sort of carrier

> is unavailable, use of a non-United States flag air carrier may be authorized. While the FTR requires that authorization be given in advance of travel for certain kinds of travel, the use of a non-United States flag air carrier only requires 'specific authorization or prior approval.' 41 CFR 301-2.5 & note thereto (emphasis added). We have found two instances in which the Comptroller General allowed reimbursement for the cost of travel by a non-United States flag carrier where a United States flag carrier was deemed unavailable pursuant to regulation, [*8] even though express authorization was not given in advance of the travel. *Colonel Dexter v. Hancock*, 73 Comp. Gen. 234 (1994); *Peter Young*, B-251103 (Apr. 5, 1993). We believe these cases were correctly decided and follow them here."
>
> *Satsky*, 16632-RELO at 6-8, 2005 GSBCA LEXIS 123 (GSBCA July 15, 2005).

B. <u>JTR Scheduling Aspirations Which Affect Overseas Travel</u>. "Aspirations" because these considerations are routinely ignored in travel between CONUS and overseas locations. The following aspirations apply to all JTR travel but are especially relevant to overseas travel.

> "Travel should be by the scheduled transportation that most nearly coincides with the departure and arrival times needed to carry out the mission. Consideration should be given to:
> ....
>
> 5. The traveler's comfort and well being [despite the fact the JTR and travel offices will repeatedly state that "personal convenience" should not be a factor];
>
> 6. The traveler being scheduled for departures and arrivals between 0600 and 2400 unless travel between 2400 and 0600 is required by the mission [I know of a travel office which took the position at the 2400-0600 consideration only applied to local departure time and local arrival time, thus it was, in that view, entirely appropriate to schedule a flight arriving at 2200 hrs local time (0400 hours at departure point) instead of a flight that arrived at 1600 hours local time (2200 hours at departure point)];
>
> 7. Arranging transportation so that the traveler is scheduled to arrive the day before the TDY actually begins [but there are travel offices who believe they meet this requirement as long as the flight arrives at the destination airport before midnight on the day prior to the TDY duty];

8. Scheduling the travel for a departure to enable an en route rest stop or an overnight rest period at the destination under the circumstances in par C1060-B or C1060-C [this requirement is routinely ignored];

9. Requiring travelers to identify travel requirements in sufficient time (if known) to arrange coach-class accommodations; and

10. Carefully reviewing requests for first- and business-class accommodations to determine if mission needs may allow for a change in travel dates to support a lower-class accommodation.

JTR C1059 "Scheduling Travel."

C. Other JTR Aspirations Affecting OCONUS Travel.

1. The JTR Preference. "When scheduling flights of 14 or more hours ..., the first choice is always to fly the traveler in economy class and have the traveler arrive the day before the TDY is to begin to allow for appropriate rest. Second choice always is to fly the traveler in economy class and arrange an en route rest stop (preferably at a no-cost point allowed by the airline) with arrival on the day TDY starts. The last option, and clearly the most expensive option which should be avoided whenever possible, is to permit the traveler to travel in Government funded business accommodations with arrival on the day the TDY starts." JTR C1060 Note 1. Note that the restriction on rest stops are nearly the same as the restrictions on premium class travel. JTR C1060.

Comment: Lost in the maze of rules is any concern for having spent the money to send an employee to a distant location, that the traveler be functional when they show up for work. For example, "When scheduling flights of 14 or more hours ... , the first choice is always to fly the traveler in economy class and have the traveler arrive the day before the TDY is to begin to allow for appropriate rest." The problem is that travel offices believe they have met this requirement if the traveler arrives at the airport of the TDY destination any point up to midnight before the duty day.

2. "24 Hour" Rest Rule & 2400-0600 Travel. "Reclining seats on planes ... are not acceptable sleeping accommodations. If a traveler is required to travel overnight (2400 - 0600) without acceptable sleeping accommodations, arrival should be scheduled to provide an en route rest stop or an appropriate rest period (not to exceed 24 hours) at the TDY point before the traveler is required to perform official duties." JTR C1060 Note 2 (internal references omitted).

Comment: The biggest problems with this rule:

(1) Which midnight and 0600 are we talking? The departure time or destination time - for example, with a 6 - 7 hour difference between Europe and CONUS, arriving in CONUS at 1600 (2200 at the departure point) is much preferable to arriving in CONUS at 2200 (0400 at the departure point), yet travel offices will not infrequently claim the later flight complies with the JTR.

(2) The Rest Rule is that it isn't defined beyond the JTR's note that it shouldn't be longer than 24-hours. Travel Offices will not infrequently claim they have met this requirement even though the traveler is arriving at the TDY destination at about mid-night with duty beginning 0800 the following day.

(3) The distinction between the "scheduled flight time" and arrival at the TDY destination is often confused. For purposes of the "14 hour rule" the time is scheduled flight time including time waiting for connections. For all other purposes though, arrival time is at the TDY destination.

(4) The JTR never explains the distinction between the normal arrival at a TDY destination the day before the TDY begins, and any additional rest time the traveler may be entitled to under the regulations, e.g., arriving two days before the scheduled TDY begins in order to adjust to the new time zone.

3. "A traveler should not be required to use a carrier if using that carrier requires beginning travel ... between 2400 hours and 0600 hours if there are more reasonable schedules that meet mission requirements." JTR C1060-A.1.d

4. "A prudent AO should schedule travel so that lodgings may be provided so the traveler can retire at a reasonable hour and be ready to perform official business as required." JTR C1060-A.1.e, *citing* 33 Comp. Gen. 221 (1953); 61 Comp. Gen. 448 (1982).

5. "Transportation should be arranged so that the traveler is scheduled to arrive the day before the TDY actually begins." JTR C1060-A.1.f

6. "A traveler should be scheduled for a departure in time for an en route rest stop or an overnight rest period at the destination under the circumstances in pars. C1060-C and C1060-D." JTR C1060-A.1.g.

7. "To prevent travel between 2400 and 0600, it is reasonable for a traveler to depart the ... TDY station on the earliest available transportation

accommodations the day after completing a TDY assignment, provided the traveler is not required to be at the PDS the morning after TDY completion." JTR C1060-A.2.b.

D. <u>En Route Rest Stops</u>. As with a rest period at the TDY destination, the JTR's provisions on en route rest stops is circular and not a little inconsistent.

1. <u>Rest Stops Are Not Automatic</u>. "Authorizing ... an en route rest stop ... must be used only when the circumstances warrant. Such a rest stops should not be automatic. The AO must consider each request for a[n] ... en route rest period ... individually and carefully balance good stewardship of scarce resources with the immediacy of mission requirements. JTR C1060-B, *referencing paragraphs* C1059 and C1060 Note 1, the later relating, "Second choice [when scheduling flights of 14 hours or more] always is to fly the traveler in economy class and arrange an en route rest stop (preferably at a no-cost point allowed by the airline) with arrival on the day TDY starts." JTR C1060-Note 1 (parenthetical comment in original; what century is the JTR dealing with?).

2. <u>When OCONUS Travel Is Involved</u>, the AO may authorize a rest stop en route when:

    a. The origin or destination point is OCONUS;

    b. Travel is by a usually traveled route;

    c. Travel is by less than first/business-class service; and

    d. The scheduled flight time, including [non-overnight] stopovers and plane changes, exceeds 14 hours.

    JTR C1060-C.2.

    a. The JTR then immediately notes that, "The 'length of flight (14-20-30-40 hours)' in and of itself is not sufficient justification to authorize an en route rest stop. The justification must be that the TDY mission was so unexpected that traveler was unable to schedule a flight arriving the day prior to allow rest before starting work." JTR C1060-C.2 Note.

3. <u>Prohibitions</u>. A rest stop en route may not be authorized at Government expense when:

    a. Travel is authorized by premium class service.

b. A traveler chooses to travel by a circuitous route, for personal convenience, causing excess travel time.

c. A traveler takes leave at a stopover.

JTR C1060-C.3

4. Rest Stops En Route For TDYs Only. A rest stop en route ... may not be provided for official travel for PCS, RAT, emergency leave, R&R, FEML, and personnel evacuations. A rest stop en route ... may only be authorized when travel is to the TDY site. A rest stop en route may not be authorized for the return flight if the traveler can rest before reporting back to work. JTR C1060-B & C Note.

5. Location of En Route Rest Stop. An en route rest stop:

   a. May be authorized/approved at any intermediate point; and

   b. Should be as near to midway in the journey as authorized carrier scheduling permits; or

   c. Scheduled at a point en route at which the carrier permits free stopovers (if possible).

   JTR C1060-C.4.

6. Duration of En Route Rest Stop & Per Diem. An en route rest stop is for a reasonable rest period, not to exceed 24 hours, plus necessary time to obtain the earliest transportation to the authorized destination. JTR C1060-C.5. The rest stop locality per diem rate applies. JTR C1060-C.6

7. Orders Annotation. When using length of flight to justify a rest stop the authorizing/approving official must cause the travel authorization to be clearly annotated as to when the TDY travel was identified and when travel reservations were made. JTR C1060-C.2 Note.

E. Rest Period at TDY Point. The JTR's advice on this is actually circular and not a little inconsistent.

1. Rest Periods Are Not Automatic. A "rest period at a TDY point must be used only when the circumstances warrant. **Such a rest stops should not be automatic**. The AO must consider each request for a ... rest period at TDY point individually and carefully balance good stewardship of scarce resources with the immediacy of mission requirements." JTR C1060-B

(emphasis added), *referencing* JTR C1059 *and* C1060 Note 1. JTR C1059 provides for, "Scheduling the travel for a departure to enable an ... overnight rest period at the destination under the circumstances in par 1060-B ... ." While C1060 Note 1 states that, "When scheduling flights of 14 or more hours ... **the first choice is always** to fly the traveler in economy class and have the traveler arrive the day before the TDY is to begin to allow for appropriate rest." (Emphasis added). Shouldn't the first choice be near automatic? JTR C1060-B.

2. Duration of Rest Period. "A reasonable rest period at the TDY point (not to exceed 24 hours) is recommended before the traveler reports for duty when ... [t]he scheduled flight time, including [non-overnight] stopovers and plane changes, exceeds 14 hours by a usually traveled route." JTR C1060-D.1. Yet despite recommending a reasonable rest period at the TDY point where flight time exceeds 14 hours, in the very next breath the JTR states, "The 'length of flight (14-20-30-40 hours)' in and of itself is not sufficient justification to authorize a rest period at the TDY point. The justification must be that the TDY mission was so unexpected that traveler was unable to schedule a flight arriving the day prior to allow rest before starting work." JTR C1060-D.1 Note. So what of the JTR's concern for the "traveler's comfort and well being" or even being awake during the temporary duty? JTR C1059-5.

    a. An "appropriate rest period (not to exceed 24 hours)" at the TDY point should be provided at the destination when the "traveler is required to travel overnight (2400 - 0600) (in which case arrival should be scheduled to provide before the traveler is required to perform official duties)." JTR C1060-D.4.

3. Annotations on Orders. "When using length of flight to justify a rest period at the TDY location the authorizing/approving official must cause the travel authorization to be clearly annotated as to when the TDY travel was identified and when travel reservations were made." JTR C1060-D.1 Note.

4. Rest Periods at the Destination Point are limited to TDY's at the destination point - not for "PCS, RAT, emergency leave, R&R, FEML, and personnel evacuations." JTR C1060-B (emphasis removed).

5. Rest Periods at the TDY Point Are Not Allowed When:

    a. A rest stop en route rest stop is not allowed. JTR C1060-D.2.

    b. The traveler was authorized first- or business-class accommodations. JTR C1060-D.3.

F. Following Day Departure. "Delaying Return Travel to Use Reduced Travel Fares. When, to qualify for reduced travel fares, a traveler elects to stay at a TDY station longer than required by the assignment and the action is authorized/approved by the AO, per diem or AEA for the additional time may be paid if the:

1. Transportation savings offsets the additional per diem or AEA cost, yielding an overall savings to the Government; and

2. Delay does not extend the TDY time beyond the time when the traveler is required to be at work at the PDS (B-192364, 15 February 1979; B-169024, 5 May 1970)."

JTR C1060-E.

G. Premium Class Travel. It is said of the Puritans that their greatest concern was that someone out there might be having a good time. The same could be said of the JTR's concern about TDY travel - and this is never more evident than in the rules on premium class travel. The JTR's provisions regarding government funded business class or (worse) first class travel are designed to prohibit premium and first class travel at government expense. The threshold requirement for premium class OCONUS travel is that the scheduled duration of the flight(s), including intermediate stops, must exceed 14 hours. But having met that requirement, the challenge of getting premium class travel only begins. A 2004 GAO Audit #04-88 found improper use of premium class travel as well as weaknesses in internal controls. This led DOD to restrict authorizing officials to two-star commanders or SES. Memorandum for the Secretaries of the Military Departments et al, from Paul Wolfowitz, subj. "Premium Class Travel and Reporting Requirements" (March 19, 2004).

1. The Basics. This discussion is limited to situations where the agency funds premium class travel; not where the employee is using air miles to upgrade. "Premium class travel" as used in this outline refers to business or first class travel.

   a. Premium Class Travel is Limited to TDYs. Where the justification is based on the 14-hour rule, business class travel is not available for PCS travel, RAT leave, emergency leave, EVT, FVT, R&R, FEML, or personnel evacuations. JTR C2204-B.4.i Note 2.

   b. Overcoming the Restriction On Evacuation Travel. In order to overcome the restriction on business class travel for personnel evacuations, use could be made of the business class travel exception where use of coach class would "entail danger to the traveler's life or

Government property," e.g., if they are left behind to wait for coach travel. JTR C2204-B.4.c(1).

c. Premium Class Travel is Typically Limited to Travel to the TDY Destination. Premium class travel is limited to situations where you begin work at the TAD/TDY location the day the employee arrives. If the employee is able to arrive the day before the TAD/TDY duty begins, premium class travel is not authorized.

(1) Premium travel is limited from the point of origin to the TDY/TAD location - the return travel would ordinarily be in coach unless there was a separate justification for premium travel on the return flight.

2. Basic Rule for Premium Class Travel. "Travelers must be provided coach-class (economy) airline accommodations for all official business travel (including PCS, TDY, RAT leave, emergency leave, EVT, FVT, R&R, FEML, **flights over 14 hours**, personnel evacuation) unless proper documentation/justification is provided (ordinarily before travel, see par. C2000-A2a) and substantiated to justify premium-class transportation." JTR C2204-B.1.a (parenthetical comments in original). "Commands and travelers should determine travel requirements in sufficient time to reserve and use coach-class accommodations." JTR C2204-B.1.b.

Comment: While the basic requirement for qualifying for premium class travel is that the flight be 14 hours or longer, the rule is so loaded down approval requirements and exceptions that the approval process seems designed to make the process more painful than sitting for 14 hours in coach.

a. The traveler is not eligible for business-class airline accommodations at Government expense if:

- Use of business-class airline airfares provided under the Contract City Pair Program is mandatory;

- A 'Stopover' en route (regardless of who pays the expenses during the 'stopover') is an overnight stay;

- Rest stop en route is authorized; or

- Overnight rest period occurs at the TDY location before beginning work.

JTR C2204-B.4.i Note 3 ¶ 1 (emphasis omitted) (Note: the literal language of the provision is badly garbled and doesn't actually say

this, but this is what the JTR provision is attempting to say).

3. Definitions:

   a. "'Stopover' en route (regardless of who pays the expenses during the 'stopover') is an overnight stay." JTR C2204-B.4.i Note 3 ¶ 1.a (emphasis omitted).

   b. "Scheduled flight time is the time between the scheduled aircraft departure from the airport serving the PDS/TDY point and the scheduled aircraft arrival at the airport serving the TDY point/PDS including scheduled non-overnight time spent at airports during plane changes." JTR C2204-B.4.i Note 3 ¶ 2 (emphasis omitted).

   c. Critically - what constitutes an "overnight stay" or a "rest stop" is not defined.

   d. "Reclining seats on planes, trains, or buses are not acceptable sleeping accommodations. If a traveler is required to travel overnight (2400 - 0600) without acceptable sleeping accommodations, arrival should be scheduled to provide an en route rest stop or an appropriate rest period (not to exceed 24 hours) at the TDY point before the traveler is required to perform official duties (see pars. C1060-C and C1060-D)." JTR C 1060-A.1.c Note 2.

   e. Definition of Premium Class. If an airline flight has only two classes of service with two distinctly different seating types available and the front cabin is termed business-class by the airline and the tickets are fare-coded as business-class, then the front cabin is business-class. If an airline flight has only two cabins but equips both cabins with one type of seating (i.e., seating girth and pitch are the same), codes the airfares in the front of the airplane as full-fare economy-class, and only restricted economy fares are in the "economy" cabin, the entire aircraft is economy seating. In this second situation, qualifying for premium-class travel is not required to purchase a non-restricted economy-fare seat in the front of the aircraft as the entire aircraft is "economy." JTR C2204-B.1.f.

Note: The airline schedules do not permit continuous travel from Europe to Pearl Harbor; the furthest west a traveler can reach in a day is the West Coast, arriving near midnight for a flight to Honolulu the following morning at 0630. With a 0500 show time at the airport the five and a half hour rest constitutes an "overnight rest period" and thus precludes business class travel from Europe to Pear Harbor - but under the rules, business class travel could be authorized for a shorter trip to the West Coast.

4. Annotation of Orders. The specific justification or paragraph reference number for premium class travel must be placed on the travel authorization. Personnel with Blanket Travel Authorization must get an individual amendment for each trip requiring premium class travel. JTR C2204-B Note 2. For additional annotations to the orders when business class justification is based on the 14 hour rule, see page 170.

5. Extenuating Circumstances For Taking Premium Class Without Orders. "Requests for premium-class accommodations must be made and authorized in advance of the actual travel unless extenuating circumstances or emergency situations make advance authorization impossible. If extenuating circumstances or emergency situations prevent advance authorization, the traveler must obtain written approval from the appropriate authority within 7 days of travel completion." JTR C2000-A.2.a.

    a. Memo to the Authorizing Official. "A travel authorization authorizing premium-class accommodations due to extenuating circumstances or emergency situations must clearly explain the circumstances of the situation (i.e., not simply state the JTR phrase, but provide the background to enable an audit of the rationale for the upgrade) and include the difference in cost between the premium-class and coach-class airfares, authority and authorization source (memo/letter/ message/etc., including date and position identity of the signatory for first-class)). Appropriate Government transportation documents must be annotated with the same information." JTR C2000-A.2.a.

    b. Potential Penalty. "If premium-class travel is not approved after-the-fact, the traveler is responsible for the cost difference between premium-class transportation used and the transportation class for which the traveler was eligible." JTR C2000-A.2.a.

6. DOD Reporting Requirement. In response to a GAO report, DOD implemented a monthly reporting requirement to the Principal Deputy Under Secretary of Defense (Personnel & Readiness) on all government funded premium travel. Memorandum from David Chu to the Secretaries of the Military Departments et al., Subj. "Premium Class Travel Reporting Requirement" (March 19, 2004).

H. Use of Business Class. "***Use of business-class accommodation must not be common practice. Business-class accommodations must be used only when exceptional circumstances warrant.***" JTR C2204-B.4 (emphasis in original).

1. Typically Restricted to the TDY Destination. "On TDY travel, the 14-hour rule only applies en route to the TDY site. Coach (economy) accommodations are to be used for the return flight if the return flight is not critical and the traveler can rest before reporting back to work." JTR C2204-B.4.i Note 3 ¶ 3 (internal citations and emphasis omitted).

2. Justification for Business Class Travel. "The last option, and clearly the most expensive option which should be avoided whenever possible, is to permit the traveler to travel in Government funded business accommodations **with arrival on the day the TDY starts**." JTR 1060 Note 1 (emphasis added).

Note: The practical effect of Note 1 is that as a result of the earth's rotation and airline schedules, only employees going from CONUS to Europe can fly government funded business class. Airlines departing Europe typically fly west during the day with an evening or night-time arrival in CONUS and typically fly east from CONUS at night arriving in Europe in the morning. Although the regulatory provision is equally applicable to all flights the situation recalls similar regulation of Thames river travel in 1500 England.

A Man For All Seasons (Columbia 1966)

Boatman: [At Hampton Court] Chelsea, sir?
Moore: Chelsea.
Boatman: Well, I expect you will make it worth my while sir.
Moore: Have you got a license?
Boatman: Bless you, yes sir, I got a license.
Moore: Well then, the fares are fixed.
Boatman: They are sir. Hampton to Chelsea downstream a penny-haypenny; Chelsea to Hampton upstream a penny-haypenny. Whoever makes the regulation doesn't row a boat.
Moore: No.

a. OCONUS TDY Travel & the 14 Hour Rule. JTR C2204-B.4.i. (The 14-hour rule only applies to Foreign OCONUS Travel. JTR C2204-B.4.i Note 2).

(1) Rule: "The TDY travel is between authorized origin and destination points (at least one of which is OCONUS), the scheduled flight time (including non-overnight airport stopovers and plane changes) is in excess of 14 hours, and the TDY purpose/mission is so urgent it cannot be delayed or postponed, and a rest period cannot be scheduled en route or at the TDY site before starting work." JTR C2204-B.4.i (emphasis omitted).

(2) "The 'length of flight (14, 20, 30, 40 hours)' in and of itself is not sufficient justification to authorize premium class accommodations. The justification must be that the TDY mission was so unexpected that traveler was unable to schedule a flight arriving the day prior to allow rest before starting work or a layover en route to allow rest before traveling on to the destination to begin work." JTR C2204-B.4.i Note 2 (emphasis omitted).

(3) Annotations to Orders. The following is subject to the extenuating or emergency situation exception at JTR C2000-A.2.a.

(a) "When using length of flight [OCONUS travel over 14 hours] to justify business-class accommodations, the business-class authorizing/ approving official must cause the travel authorization to be clearly annotated as to when the TDY travel was identified, when travel reservations were made, and the cost difference between coach-class and business-class accommodations." JTR C2204-B.4.i Note 1 (emphasis omitted).

(b) "The AO must certify that the options contained in NOTE 1 in par. C1060 have been read and considered if par. C2204-B4d is placed on the travel authorization in accordance with par. C3150-B16(c)." JTR C2204-B.4.i Note 1 (emphasis omitted).

(c) "The AO must certify that the options contained in Note 1 in par. C1060 have been read and considered [traveling to arrive the day before the TDY or using a rest stop en route] if par. C2204-B4d is placed on the travel authorization [for use in connection with Federal advisory committees etc - note the JTR provision is incorrect here, the justification for any business class travel must be stated on the DD Form 1610, not just for travel with advisory committees] in accordance with par. C3150-B16(c) [which describes how to fill out the DD Form 1610 'Request and Authorization for TDY Travel of DOD Personnel' and provides the language necessary in Block 16 'Remarks' for business class travel]." JTR C2204-B.4.i Note 2 (emphasis omitted).

b. Space Is Not Available in Coach-Class.

(1) The Rule: Business class travel can be used when coach class is not available "on any scheduled flight in time to accomplish the official (TDY) travel purpose/mission, a purpose/mission that is so urgent it cannot be postponed." JTR C2204-B.4.a (emphasis removed).

(2) This justification can only be used for TDY travel, "Business-class accommodations may not be provided for official travel for PCS, RAT leave, emergency leave, EVT, FVT, R&R, FEML, and personnel evacuations." JTR C2204-B.4.a.

(3) "When TDY travel in business-class accommodations is authorized/ approved because the mission is 'so urgent it cannot be postponed,' business-class accommodations may only be authorized to the TDY site. Coach (economy) accommodations are to be used for the return flight if the return flight is not critical and the traveler can rest before reporting back to work." JTR C2204-B.4.a.

(4) Annotation to Orders. The "business-class authorizing/ approving official must require that the travel authorization be clearly annotated as to when the TDY travel was identified, when travel reservations were made and the cost difference between coach (economy) and business-class." JTR C2204-B.4.a.

c. Use of the Business-class Accommodations Would Result in an Overall Savings to the Government Based. An actual cost-comparison must be made based on economic considerations (e.g., the avoidance of additional subsistence costs, overtime, or lost productive time) that would be incurred while awaiting coach-class. The details of the analysis must be made part of the travel authorization. JTR C2204-B.4.h.

d. "The Goat in the Aisle Rule." Business class travel is authorized when "coach-class airline accommodations on foreign carriers do not provide adequate sanitation or meet health standards and foreign flag air carrier service use is authorized/approved in accordance with the Fly America Act." JTR C2204-B.4.g.

e. When Regularly Scheduled Flights are All Business Class. This includes the connection points. JTR C2204-B.4.e.

f. Medical & Security Reasons.

(1) Premium-class accommodations may be authorized/ approved by the premium-class authorizing/ approving official due to medical reasons only if competent medical authority certifies that sufficient justification of disability or other special medical need exists and that the medical condition necessitates (for a specific time period or on a permanent basis) the premium-class accommodations upgrade. The analysis has to include consideration of economy "bulk-head" seating or providing two economy seats would meet the travelers needs. JTR C2204-B.4.b, *referencing* C2000-A.2.c.

(2) Exceptional Security Circumstances require business class travel, such as: danger to the traveler's life or Government property, agents on protective duty accompanying individuals authorized to use business class, or couriers and control officers accompanying controlled packages or pouches. JTR C2204-B.4.c. Note, this rule could be used to justify business class travel that is otherwise not allowed for evacuation travel.

g. Special Travel - Federal Advisory Committees & Congressional Travel & Travel Paid by a Non-Federal Source. JTR C2204-B.4.d (travel with Federal advisory committees and special high level guests); C2204-B.4.g (when accompanying a Member of Congress or a member of the armed forces traveling for "field examinations of appropriation estimates" under 31 U.S.C. 1108(g)."; and C2204-B.4.f (non-Federal source funding requires compliance with Joint Ethics Regulation, DOD 5500.7-R, and the travel authorization must annotate that transportation has been funded in advance).

3. Who Can Approve Business Class Travel. For the Military Departments, the approval authorities are the Secretary, who may re-delegate to the Under Secretary, the Service Chief, Deputy Chief, four-star major commanders, their three-star deputy commander, or two star or civilian equivalent level and no further. JTR C2204-B.2.c.

I. First-Class Travel. JTR C2204-B.3. This discussion applies to government funded first class travel, not to upgrades using air miles.

1. Justification for First Class Travel.

a. Lower Class Travel is Not Reasonably Available. Lower class travel

is reasonably available if the airline is scheduled to leave within 24 hours of the traveler's proposed departure time or arrive up to 24 hours before the traveler's proposed arrival time (presumably measured from when the first class travel would get the traveler there). Lower class travel is not reasonably available if it arrives after the required reporting time at a duty site or is scheduled to depart earlier than the traveler is scheduled to complete the TDY duty. JTR C2204-B.3.a.

(1) This justification can only be used for TDY travel, not for travel involving PCS, RAT leave, emergency leave, EVT, FVT, R&R, FEML, or personnel evacuation and flights over 14 hours in duration, since arrival time/reporting time in these cases is not mission critical. JTR C2204-B.3.a. Where delay in an evacuation could endanger the traveler's life or government property, see the discussion Security Reasons below.

(2) Order Annotation. The AO must have the travel authorization clearly annotated as to when the TDY travel was identified, when travel reservations were made, and the cost difference between coach and first-class accommodations. JTR C2204-B.3.a. The requirement for AO annotation is subject to the extenuating or emergency situation exception at JTR C2000-A.2.a.

(3) First Class Travel v. Use of Foreign Airline. Of course, if the choice is between traveling first class on a U.S. flag carrier versus coach on a foreign carrier, then the traveler should use the foreign carrier. JTR C2204-C.2.k.

b. Medical Reasons & Security Reasons. The rules here are the same as for business class travel, except in the case of medical reasons, first-class may be considered for use when and if business class transportation is not available. JTR C2204-B.3.b - .c.

c. When Regularly Scheduled Flights are All First Class. This includes the connection points. JTR C2204-B.3.e.

d. Special Travel - Federal Advisory Committees & Congressional Travel & Travel Paid by a Non-Federal Source.

(1) Travel with Federal advisory committees and special high level guests. Requires approval of the DOD Director, Administration and Management, Office of the Secretary of Defense, or as

delegated by the Director. Business-class should be used if available. JTR C2204-B.3.d).

(2) When accompanying a Member of Congress or a member of the armed forces traveling for "field examinations of appropriation estimates" under 31 U.S.C. 1108(g). JTR C2204-B.3.g

(3) Travel is funded in advance by a non-Federal source in compliance with Joint Ethics Regulation, DOD 5500.7-R, and one of the other justifications for first class travel is met. JTR C2204-B.3.f.

2. Who Can Approve First Class Travel. For the Military Departments, the approval authorities are the Secretary, who may re-delegate to the Under Secretary, the Service Chief, Deputy Chief, four-star major commanders, or their three-star deputy commander, and no further. JTR C2204-B.2.c, *referencing* DODD 4500.9.

J. Miscellaneous Travel Expenses. JTR C1410, *citing* FTR, §301-70.300, and §301-70.301. The following rules, generally related to overseas travel, official travel, and miscellaneous travel expenses. (Note, JTR C1415 is a separate JTR provisions for reimbursement of expenses related to contemplated official travel, passports, and visa (including green cards) fees that is nearly identical to JTR C1410.)

1. Fees Related To Passports and Visas. JTR C1410-A.3. A visa is the document/stamp/insert into the U.S. passport, documenting the host nation's permission for the individual to enter into the country. Visas need to be obtained outside of the country the traveler wants to enter. Under the NATO SOFA, member nations may imposed visa requirements on civilian employees and dependents of civilian employees and military personnel. Fees for passports, visas include "green cards" and photographs needed for OCONUS travel. JTR C1410-A.3, *referencing* C1415.

a. Reimbursement for "For-Fee" Passports. Although a traveler on official business ordinarily travels on a no-fee passport, fees for applying for a regular for-fee (blue cover) passport are reimbursable when travel on an official travel authorization is to and/or from a high threat area or high risk airport by commercial air and the traveler is authorized to obtain and use a regular fee passport. Individuals traveling solely by MILAIR or AMC charter flight are not reimbursed for regular for-fee passports unless Government transportation became available on short notice (that is, after

commercial travel arrangements had been made and a passport purchased) or the travel priority is sufficiently high to require backup travel arrangements. JTR C1410-A.3.b.

b. Travel and transportation at Government expense is authorized to go to a visa issuing office located outside the local area of the employee's PDS if the traveler's presence at that office is mandatory. JTR C1410-A Note (1).

c. Travel related to acquiring a no-fee passport and visa in order to timely begin an overseas assignment may also be reimbursable. Mr. Elliot, a teacher with DoDEA, was being transferred from Iwakuni, Japan, to Naples, Italy. He was required to have an official passport (purple cover) and a visa from Italy authorizing entry. Normal processing time to acquire these documents by mail , as reported in the decision, was six to eight weeks (a very optimistic estimate), which would not get Mr. Elliot to Naples in time for the start of the school year. Following the advice of DoDEA's passport agent, Mr. Elliot and his family, stopped in Washington D.C., en rout to Naples, to obtain the passport and visa in five days (probably a record). Mr. Elliot then claimed reimbursement of expenses for the stop in Washington. His claim was initially denied on the basis that his orders did not authorize the stop-over. DoDEA then reconsidered, determined that the expenses were "'necessary for the transaction of official business' and amended his orders after-the-fact to authorize the stop in Washington." DoDEA then asked the GSBCA for an opinion on whether it could pay the claim. Citing to FTR provisions, the GSBCA concluded the expenses incurred were reimbursable. "Stopping in Washington on his way to Italy eliminated the six to eight week waiting period for obtaining the passport by mail and allowed Mr. Elliott to get to his new duty station in time to start the new school year. All of this was clearly in the Government's interest. ... DoDEA should pay Mr. Elliott's claim for transportation and subsistence expenses incurred in connection with the stopover in Washington, D.C." *Richard W. Elliott*, GSBCA 15923-RELO, 2002 GSBCA LEXIS 273, at 4-5 (December 16, 2002).

d. Legal expenses for "obtaining or processing applications" for passports, visas (including green cards) are reimbursable if local laws or custom require the use of lawyers in processing such applications. JTR C1410-A.3.a. Unless they are not. Five subsections later the JTR states, "Legal service expenses in obtaining passports or visas (including green card), for TDY or PCS, are not reimbursable even though local laws or custom may require the use of lawyers." JTR C1410-A.3.e.

e. Fees charged by the host nation for dependents' entry into the host nation are reimbursable, e.g., the United Kingdom Entry Clearance Fee is a reimbursable fee. JTR C1410-A.3.c.

f. Medical Fees Related to Gaining a Visa.

(1) Travel expenses are authorized where a physical exam is required to obtain a visa to a location outside the employee's PDS. JTR C1410-A.3 Note (2).

(2) The JTR's discussion of reimbursement for the medical examination itself is badly garbled. The GAO rule was that medical exams were primarily for the benefit of the government employee even when required as a prerequisite for overseas travel. Not payable for employees: *Payment for Expenses of Medical Examinations*, B-253159 (Nov. 22, 1993); 53 Comp. Gen. 230 (1973); 41 Comp. Gen. 531 (1962); 22 Comp. Gen. 32 (1942). Not payable for dependents: *R.P. Hogan*, B-164218 (June 10, 1968); *Lawrence B. Weier*, B-157347 (Aug. 26, 1965); 44 Comp. Gen. 339 (1964). The General Services Administration Board of Contract Appeals, which became responsible for travel claims in 1996, pointed out that the Federal Travel Regulation (FTR) allows for reimbursement of for expenses incurred as a result of a move and suggested DOD could reimburse employees and their dependents for the cost of medical exams. *Albert Carter*, GSBCA 15435-RELO, 2001 GSBCA LEXIS 77 (April 9, 2001). Whether DOD has amended the JTR to allow reimbursement for medical expenses is unclear.

(a) May Be Reimbursable. The JTR states, "Fees for ... physical examinations required to obtain a visa if examinations could not be obtained at a Government medical facility (as of 11/1/01 obtainable only in Yokosuka, Japan) ... ." JTR C1410-A.3 (parenthetical comment in original), *citing Albert Carter*, GSBCA 15435-RELO, 2001 GSBCA LEXIS 77 (April 9, 2001). It is not clear if the JTR is stating that physical examinations are only available in Yokosuka - which is certainly not the case, or that the JTR is stating that physical exams are only unavailable at Yokosuka - which isn't the case either. The cited *Albert Carter* decision has nothing to do with Yokosuka or even the Orient, but rather involves a PCS from Germany to Georgia, United States.

(b) Are Not Reimbursable. At the same time the JTR has the language in paragraph C1410-A.3 (discussed immediately above) it also states the long-standing GAO rule, "Medical fees, even though incurred as a consequence of the entry requirements of a country to which the member is sent ... are not reimbursable ... ." JTR C1410-3.d.

(3) Except for the cost inoculations, when they are not available through a Federal dispensary, are reimbursable. JTR C1410-A..4 & JTR C1410-A.5, C1410-3.d.

2. Birth Certificates. The cost of obtaining birth certificates or other acceptable evidence of birth is reimbursable. JTR C1410-A.4, *referencing* JTR C1410-A.3.d *and* C1410-A.3.e.

3. Innoculations, if not available through a Federal dispensary are reimbursable. JTR C1410-A.5.

4. Taxes On Lodging are not separately reimbursable overseas, the taxes are included in the authorized lodging rate for the overseas area. JTR C1410-A.6.b.

5. Reimbursement Related to Currency Conversion.

   a. Travelers are "***not authorized reimbursement for losses, nor are they liable for gains, resulting from currency conversions*** ... ." JTR C1410-A.7.a(1) (emphasis in original), *citing* 63 Comp. Gen. 554 (1984).

   b. Travelers can claim the actual expense in dollars charged on a credit card for a purchase made in a foreign currency, i.e., travelers can use the credit card currency exchange rate and not the exchange rate the servicing claims office uses. JTR C1410-A.7.a(2).

   c. Where the actual amount in U.S. currency isn't known until after the "required travel claim submission date" the traveler can submit an initial travel voucher estimating the exchange rate. The JTR then states, "travelers should make themselves aware of any financial regulations that require submission of a supplemental voucher if the amount(s) submitted as expenses differ(s) from the actual amount billed on the initial travel claim." JTR C1410-A.7.a(3). Note this provision may be extraneous; all credit cards I'm familiar with can be contacted by phone and will provide the actual amount charged within days of the foreign charge being made. JTR C1410-A.7.a(3).

6. 1% Credit Card Fee. Travelers can claim "the 1% "international transaction fee" for official qualifying transactions charged by the Government-sponsored contractor-issued travel charge card vendor. This charge is listed as a separate line item on the credit card billing statement." JTR C1410-A.7.a(4).

7. Check Cashing Fees. Travelers can be reimbursed for fees for cashing U.S. Government checks/drafts not including checks or drafts for salary. JTR C1410-A.7.b.

8. Laundry Expenses are NOT Reimbursable. Costs for personal laundry or dry-cleaning are reimbursable only for CONUS TDY/PCS travel, not OCONUS. See JTR C1410-A.13.

9. "Similar travel and transportation related expenses" can be reimbursed. JTR C1410-A.14.

10. Reimbursement of Insurance Expenses for TDY/TAD Travel Only. The traveler may recover the cost of trip insurance in a foreign country to cover potential damage, personal injury, or death to third parties when travel is authorized by Government conveyance or POC and a Service-designated official determines that legal requirements or procedures of the foreign country involved make it necessary to carry such insurance. JTR C1410-B.3, *citing* 55 Comp. Gen. 1343 (1976).

K. Additional Rules Applicable to PCS Travel.

1. Dependent Transportation. An employee is authorized reimbursement for fees (including affidavits) in connection with dependents' transportation that cover a change in status, health, identity. But, reimbursement is not authorized for fees/charges for legal services even though local law or custom require lawyers' services in processing applications for passports, visas (including green cards), or changes in status. JTR C1410-C.

2. Excess Accompanied Baggage. Excess accompanied baggage transportation costs may not be authorized in advance of PCS travel. They may only be approved by the AO after PCS travel. A Miscellaneous Charge Order (MCO), a coupon used as a general-purpose voucher for services (such as excess baggage), must not be used for accompanied baggage in connection with PCS travel. JTR C1410-C Note. The excess weight counts against the maximum weight allowed for a HHG move. If the baggage moves as accompanied baggage, the authorized excess amount will be treated as gross weight. If it is shipped as unaccompanied

baggage the authorized excess amount will be considered as net weight. JTR C2304-C.

L. Use Of Government & Contracted Aircraft.

1. Use of Government Aircraft. "Government aircraft may be used only for official purposes in accordance with 41 CFR 101-37.402." JTR C2001-D.2.

2. Air Mobility Command (AMC) Flights. "Travel may be authorized by AMC aircraft in accordance with the regulations of the separate departments. When travel is performed by scheduled AMC aircraft, the applicable Customer Identification Code (CIC) and Air Movement Designation (AMD) must be included in the travel authorization." JTR C2051-A.

3. Use of Non-AMC Government Flights. Travel may be authorized by military aircraft other than AMC in accordance with the regulations of the separate DoD components. JTR C2051-B.

XIX. HOME LEAVE, EXTENSION OF TOURS & RENEWAL AGREEMENT TRAVEL (RAT)

There is no requirement that home leave be used for RAT, but the limitations on using each means that home leave is typically spent on RAT, although home leave can be used throughout the United States, whereas RAT is limited to the employee's residence or one alternate location.

A. Home Leave. 5 U.S.C. 6305; 5 C.F.R. 630.601 - .607.

1. Available after 24 months of continuous service outside the United States (or a shorter period if the employee's assignment is terminated for the convenience of the Government). 5 U.S.C. 6305(a), 5 C.F.R. 630.606(a). To earn home leave under section 6305(a), the employee must be entitled to accumulate a maximum of 45 days of annual leave under 5 U.S.C. 6304(b). 5 C.F.R. 630.602.

2. Accumulated at a rate not to exceed 1 week for each 4 months of that service. 5 U.S.C. 6305(a). The earning rate is specified in 5 C.F.R. 630.604. Most employees in Europe would accumulate home leave at a rate of 5 days per 12 months. 5 C.F.R. 630.604(a)(5). Accumulates without regard to the limitations on annual leave in section 6304(b). 5 U.S.C. 6305(a)(2). May not be made the basis for terminal leave or for a lump-sum payment. 5 U.S.C. 6305(a)(3).

3. For use in the United States, or if the employee's place of residence is

outside the area of employment, for use in the territories or possessions of the U.S. including the Commonwealth of Puerto Rico. 5 U.S.C. 6305(a)(1).

4. Exemption From Use of Annual Leave In Conjunction with Travel Home. Annual leave does not have to be taken for "time actually and necessarily occupied in going to or from a post of duty and time necessarily occupied awaiting transportation." 5 U.S.C. 6303(d).

   a. The statute limits this travel exemption to "one period of leave in a prescribed tour of duty at a post outside the United States ... ." 5 U.S.C. 6303(d).

   b. Applies to:

      (1) An American civil servant (per 5 U.S.C. 6303(d)(1), an employee to whom 5 U.S.C. 6304(b) applies);

      (2) Whose post of duty is outside the United States 5 U.S.C. 6303(d)(2); and,

      (3) Who returns on leave to the United States, its territories or possessions including Puerto Rico. For those employees who work outside the United States but in the territories or possessions including Puerto Rico, the leave must be taken outside the area of employment. 5 U.S.C. 6303(d)(3)

B. Extension of Tours. Once the initial overseas tour has been served, ALL subsequent continuous extensions of the tour are always extension tours, typically of two years in duration, even if the employee transfers from one F-OCONUS PDS to another F-OCONUS PDS. For example, take an employee with nine years of F-OCONUS service where the initial tour is for three years and extensions are for two years, the employee would have served tours of "3 + 2 + 2 + 2." It would not have mattered if the employee moved to another PDS during the second extension - neither the move nor the change in jobs restarts the initial 3-year tour clock.

1. Re-Transport of the Same HHG. If during the consideration of extending the employee overseas, the HHG have been shipped back to CONUS or the actual residence, the HHG may be reshipped back to the OCONUS PDS during a continuous period of OCONUS employment under the following conditions:

   - the situation was beyond the employee's control; and

- the moves were authorized or approved **by the headquarters of the DOD agency**.

No new service agreement is required for shipping the HHG back to the OCONUS PDS. JTR C5158.

C. <u>Renewal Transportation Agreements & RAT</u>. 5 U.S.C. 5728(a); JTR C4003.

1. <u>Statutory Authority</u>. When an employee satisfactorily completes a post of duty outside the 50 states, "an agency shall pay" for the expenses of round trip travel of an employee and transportation of his immediate family, but not HHG, from his post of duty to his actual place of residence, and take leave before serving another tour of duty at the same or another post of duty outside the 50 States, under a new written agreement made before departing from the post of duty. 5 U.S.C. 5728(a).

2. An employee is entitled to home leave travel at the end of an initial 36-month period, and again every 24 months thereafter, provided the employee meets all other requirements of 5 U.S.C. 5728. *Brown v. United States*, 3 Cl Ct 31 (1983).

3. <u>Eligibility</u>. Renewal agreements are negotiated with employees who have satisfactorily met the conditions of the initial TA. JTR C4003-A. Additionally, the employee must have:

   a. Have maintained an "acceptable actual residence outside the geographical locality of employment." JTR C4003-A.

      (1) The TA is recorded on a DD Form 1617. Block G asks for "Actual Residence at Time of Appointment (To be determined at time of initial agreement)." The address to put here is NOT where you are actually living overseas, but your home of record or legal residence - the (typically) CONUS destination the government is required to return you to after the end of your OCONUS tour.

   b. Satisfactorily completed the prescribed tour of duty at the PDS the employee is departing.

   c. Entered into a written TA for another tour of duty at an OCONUS PDS. The new TA should cover costs incident to travel to the

employee's actual residence or alternate location and return to OCONUS; and any additional costs to be paid by the Government as a result of the employees transfer to another OCONUS PDS at the time of the RAT. JTR C5503.

d. Prohibitions.

(1) The JTR generally prohibits negotiating a renewal agreement with locally hired married employees and unmarried dependents under 21 years of age. JTR C4003-C.

(2) As a general rule, persons already in the overseas area when hired by the government as a local hire, are not entitled to RAT. Regulations establishing point of hire (i.e., CONUS v. OCONUS) as the trigger to entitlement to RAT are reasonable. *Acker v. United States*, 6 Cl. Ct. 503 (1984).

4. Remember, "A renewal agreement establishes eligibility for round trip travel and transportation allowances for an employee and dependents for the purpose of taking leave between consecutive periods of OCONUS employment. **A renewal agreement does not establish any HHG transportation authority**." JTR C4001-A (emphasis added).

5. Residence & RAT.

a. The statutory purpose of RAT is to allow the employee to return to his State-side residence contemporaneous with a follow-on OCONUS tour. Consequently, "the employee, and the employee's dependents must spend the majority of the RAT time in the CONUS or that non-foreign OCONUS location for RAT travel to be authorized." JTR C5536-C. GSA says this a little differently giving the employee on RAT greater discretion as to destination. "If your [the employee's] actual place of residence is located in the U.S., you and your family must spend a substantial amount of time in the U.S. in order to receive reimbursement." 41 C.F.R. 302-3.220 note.

b. The employee generally needs to have an actual residence (a domicile) in the States to return to.

(1) It is for the agency to determine the employee's "actual residence" and the Comptroller General will not question any reasonable determination by the agency. *Michael Newman*, B-257861 (Comp. Gen. Feb. 15, 1995).

(2) Appointee who is an actual resident of a Germany at the time of

appointment is not entitled to RAT. Actual residence is actual physical presence and location for extended period of time and differs from legal residence. The fact that the employee has paid taxes in the United States and maintained voting eligibility during actual residence abroad does not preclude a finding of that the overseas residence is the actual residence. *Brown v. United States*, 741 F.2d 1374 (Fed. Cir. 1984).

(3) BUT, by regulation the employee may do RAT to the "country of the employee's actual residence." JTR C5536-A.1.b. RAT is not authorized however, when the employee is "merely routed through the country of actual residence en route to another country." JTR C5536-D.2 (presumably the "other country" is not to the subsequent F-OCONUS PDS).

c. Alternative Destination. RAT is authorized to an alternative location in a CONUS or NF-OCONUS location. C5536-A1.a.

(1) The alternative destination should be the official travel destination and approved before hand but may be approved after the fact. JTR C5536-A.2, C5536-E.

(2) RAT is not authorized as an alternative destination when the employee "[t]ravels to various points for personal reasons (e.g., a 'travel tour')." JTR C5536-D.3.

(3) Reimbursement to the alternative destination "must not exceed the amount allowed for transportation along a usually traveled route between the PDS and the actual residence." JTR C5538-F.

6. "RAT authorization is not cumulative from one period of service to another if not used." JTR C5521.

7. Denial of RAT Travel. Agencies cannot generally deny RAT to an eligible employee. JTR C5515-B.1. Funding RAT is mandatory on agency, not discretionary; and an agency cannot defeat RAT entitlement by refusing to negotiate with the employee for it. 63 Comp. Gen. 563 (1984). The JTR lists the following reasons for denying RAT, all of which are inherent in the RAT statute (successful completion of an OCONUS tour with assignment to a follow-on OCONUS tour). "RAT may be denied under JTR C5515-A., in the following circumstances. The employee:

a. Is being processed for separation;

b. Is going to be involved in a RIF;

c. Has a removal action pending;

d. Has been assigned to a U.S. position; or

e. Is to be reassigned to a CONUS position in connection with rotation on a similar program that precludes a required period of service completion under a renewal agreement.

8. Expenses Covered by RAT Travel.

a. Authorized Allowances. JTR C5010 Table 8.

(1) Relocation Allowances the Agency Must Pay:

(a) Transportation of employee and immediate family. JTR Vol 2, Chapt 5, Part A.

(b) Per diem for employee only. JTR C5530.

(2) Relocation Allowances the Agency Has Discretion to Pay For:

(a) HHG shipment to the new PDS. JTR C5539.

(b) Dependent Transportation to the new PDS. JTR C5518.

b. "An employee is authorized per diem during the allowable RAT travel periods between the OCONUS PDS and the authorized RAT destination." No per diem is authorized for dependents when the follow-on tour is at the same PDS. When the follow-on tour is a different OCONUS PDS, dependent per diem allowed is limited to the constructed time between the old and new PDS. JTR C5530. No other expenses associated with a PCS are allowed for RAT. 41 C.F.R. 302-3.101 Table E.

Comment: That family members don't get per diem is a good example of how minor and seemingly inconsequential differences in statutory language lead to major distinctions in allowances. The statute provides for payment of "expenses of round-trip travel of an employee, and the transportation of his immediate family" to the United States. 5 U.S.C. 5728(a), *see also* 5 U.S.C. 5722(a)(1) for a similar distinction for PCS moves involving a new employee. Here, "expenses of round-trip travel" for employee is deemed to include not just the tickets but per diem as well, while the phrase "and transportation of his immediate family" is parsed to mean that

reimbursement of the travel expenses of the family members is limited to the cost of their actual transport. The family members would be entitled to per diem if the statute had read instead, "the employee and dependents are entitled to round-trip travel and transportation expenses."

c. The employee and dependents "are authorized transportation (including transportation to and from common carrier terminals) from the OCONUS PDS to the employee's actual residence at the time of assignment to the OCONUS PDS." JTR C5512. On the trip back overseas, transportation is also authorized from the actual residence to the OCONUS PDS with limits when the new PDS is in Alaska or Hawaii. JTR C5512.

d. Language in the JTR suggests that excess baggage is not reimbursable for RAT travel. "When excess baggage is allowed in connection with permanent duty travel, **except in connection with renewal agreement travel**, the excess weight will be a part of the maximum weight allowable for HHG." JTR C2304-C (emphasis added).

e. TQSE is not authorized for RAT travel except when the return is to a JTR-specified different non-foreign OCONUS PDS. JTR C13115-C.3.

9. Scheduling Limits on RAT. RAT ordinarily is performed between OCONUS tours. JTR C5509-B.1.c.

a. Going on RAT Early. RAT may be scheduled up to 6 months before the end of the initial 36 month tour provided the renewal agreement is for duty in a 24-month tour area. JTR C4005-C.1.b.

b. Going on RAT Later. RAT may be performed after the beginning of the follow-on OCONUS tour subject to leave being granted iaw personnel regulations and "when authorized/approved by the employee's OCONUS commander." JTR 5509-B.1.c, *referencing* Comp. Gen. B-232179 (Oct., 6, 1989). The JTR provisions distinguish between RAT being delayed at management's request and at the employees request but the bottom line is that the RAT has to be completed not later than 1 year before the employee's follow-on OCONUS tour is completed.

(1) Delay at Management's Request. Management may request an employee to delay RAT by extending the initial tour (or tour then in effect) not to exceed 90 days if:

(a) The employee is engaged on a project that is scheduled for

completion within a reasonable time;

(b) There is a temporary personnel shortage; or,

(c) For other good reasons.

But, "[s]ufficient time must remain in the employee's renewal agreement tour ... to serve at least 12 months upon return to the OCONUS PDS." JTR C5509-B2.

(2) Delay at the Employee's Request. An employee may request an extension of the initial tour (or tour then in effect) to permit leave scheduling to accommodate personal/job related reasons acceptable to and permitted by the OCONUS commander concerned (see par. C4005-C1). In this case, the employee's tour after performing RAT and returning to the OCONUS is the greater of:

(a) The renewal agreement tour for the PDS concerned, decreased by the number of days the initial tour was extended; or

(b) 12 months.

JTR C5509-B.3.

(3) Also, whether for a management requested delay or at the employees request, a delay in RAT should not be authorized if the resulting extended tour, or the requirement to serve 12 months following return from RAT, requires the employee to remain OCONUS "beyond the 5- (or any other) year limit ... unless the employee is not affected by, or has been released from, the 5- (or other-) year ... limitation." JTR C5509-B.4.

10. Restrictions on RAT Travel for Dependents. The purpose of RAT is to allow an employee stationed OCONUS to return to the United States between overseas tours of duty. Payment for RAT is not available for the dependents unless the employee himself returns to the U.S. for the purpose of taking leave. *Jacqueline G. Sablan*, 15961-TRAV (GSBCA Apr 15, 2003). But, dependents could accompany employee on temporary duty assignment in the US with employee taking RAT at a later time notwithstanding general rule that federal employees have no entitlement to concurrent travel of dependents while on TDY. 65 Comp. Gen. 213 (1986).

11. Which Activity Funds RAT? JTR C1052- D.

    a. Return to the Same OCONUS PDS. When an employee completes a required service period at an OCONUS activity and executes a renewal agreement for an additional tour of duty at the same OCONUS activity, the activity to which the employee is assigned must pay all travel/transportation costs. JTR C1052- D.1.

    b. Return to a Different OCONUS PDS. When an employee completes a required service period at an OCONUS activity and executes a renewal agreement for an additional tour of duty at a different OCONUS activity, in the same or another DoD component, the losing OCONUS activity must pay the necessary costs en route to the actual residence or alternate point until return travel begins. The gaining OCONUS activity in the same or another DoD component must pay the necessary costs en route from the actual residence or alternate point to the new OCONUS PDS. The gaining OCONUS activity also must pay the transportation costs of dependents, who did not accompany the employee on the renewal agreement travel, and the HHG and POV, direct from the old to the new OCONUS PDS. JTR C1052-D.2, *citing* 44 Comp. Gen. 767 (1965).

        (1) DODEA Exception. When an employee transfers between activities funded by DODEA, all PCS costs must be paid by the gaining (area) activity, apparently including the RAT travel. JTR C1052-D.2.

12. When Does the New Tour Begin? "A tour of duty under a renewal agreement begins on the date the employee reports for duty at the OCONUS PDS following completion of RAT unless that travel is delayed and authorized/approved to be performed within a tour of duty ... ." JTR C4006-2.

XX. ORDINARY RETURN FROM ASSIGNMENT OVERSEAS.

A. Authorized Allowances. 5 U.S.C. 5722(a)(2) (new employees), JTR C5010 Table 6.

1. Relocation Allowances the Agency Must Pay. JTR C5010 Table 6 Column 1.

    a. Transportation and per diem for employee and immediate family, JTR Vol 2, Chap. 5, Part A;

b. Miscellaneous expense allowance, JTR Vol 2, Chap. 5, Part G;

c. Sale and purchase of residence transaction expenses or lease termination expenses when being returned from FOCONUS is transferred to a different CONUS or non-foreign CONUS station from which they left to go overseas. JTR Vol 2, Chap. 14.

d. Transportation & temporary storage of HHG, JTR Vol 2, Chap. 5, Part D;

e. Non-temporary (extended) storage of HHG when assigned to a designated isolated official station in CONUS, JTR Vol 2, C5195-A;

f. Relocation income tax allowance (RITA), JTR Vol 2, Chap. 16.

2. Relocation Allowances the Agency Has Discretion to Pay For. JTR C5010 Table 6 Column 1.

a. Shipment of a privately owned vehicle, JTR Vol 2, Chap. 5, Part E;

b. Temporary Quarters Subsistence Allowance (TQSA) under DSSR § 120 may be authorized for temporary quarters occupied at a foreign OCONUS PDS before departure from that PDS while TQSE may be authorized for temporary quarters occupied in CONUS.

B. HHG Move. Where the employee is returning from OCONUS for separation, PBP&E that were originally may be returned as an administrative expense to the employees actual residence or any other record at a constructed cost not to exceed the cost to the employees actual residence. JTR C5154-C.3.

C. TQSA-Departure Upon Departure from PDS. A part of the Overseas Differentials and Allowances Act, 5 U.S.C. 5923(a)(1)(A); JTR C1003, *referencing* DSSR § 120. For a discussion of TQSA upon arrival at an overseas PDS, see page 120.

1. Terminology - The "temporary quarters allowance" in CONUS prior to departure for an overseas PDS is the Foreign Transfer Allowance (FTA). 5 U.S.C. 5924(2). Upon arrival at an overseas PDS the temporary quarters allowance is the Temporary Quarters Subsistence Allowance (TQSA-Arrival). 5 U.S.C. 5923(a)(1)(A). TQSA is also available on departure from the foreign PDS (TQSA-Departure). 5 U.S.C. 5923(a)(1)(B). (Note that the term "TQSA-Departure" does not exist in the JTR - it is used here for the sake of clarity.) While on return to the

United States, the allowance is the Temporary Quarters Subsistence Expense (TQSE). 5 U.S.C. 5724a(c)(1)(A).

2. Purpose of TQSA. TQSA is intended to assist in covering the average cost of adequate but not elaborate or unnecessarily expensive accommodations in a hotel, pension, or other transient-type quarters at the post of assignment, plus reasonable meal and laundry expenses preceding final departure from the post. DSSR § 122.1. TQSA is for temporary quarters (including meals and laundry/dry-cleaning expenses) immediately preceding final departure from that PDS occupied after first arrival at a PDS in a foreign area. JTR C1003.

3. Qualifying for Departure TQSA. Remember, just because an American is employed overseas and they are PCS'ing to CONUS doesn't mean they are entitled to TQSA. An employee qualifies for TQSA only if the employee is eligible for a Living Quarters Allowance (LQA). JTR C1003, *citing* DoD Civilian Personnel Management System Manual 1400.25-M, Subchapter 1250-E and DSSR Section 031.1; *Albert Carter*, GSBCA 1435-RELO, 2001 GSBCA LEXIS 77, at 6-7 (April 9, 2001) ("Employees may receive TQSA if they were recruited in the United States for duty in a foreign area. If they were recruited outside the United States, they may receive TQSA only if certain specified requirements are met."). See discussion beginning at page 128 on LQA eligibility.

4. Duration, Initiation & Termination of Departure TQSA. Paid for up to 30 days immediately before final departure from the OCONUS post after "necessary evacuation of residence quarters." 5 U.S.C. 5923(a)(1)(B); DSSR § 121.b. This period may be extended for not more than 60 additional days if it is determined "that there are compelling reasons beyond the control of the employee ... ." 5 U.S.C. 5923(b); DSSR § 122.2.

   a. Initiation of TQSA. TQSA upon departure from the PDS begins "the date expenditures for temporary lodging are first incurred following the necessary vacating of residence quarters." The agency head or designee may authorize a 5-day overlap of LQA and TQSA if the "agency head or designee determines that it is necessary for the employee to vacate existing quarters in order to meet lease requirements for cleaning and repair." DSSR § 124.1.b. By way of comparison, State-side TQSE begins when "private or commercial lodgings [are] occupied temporarily after a PCS is authorized. (A permanent residence is 'constructively vacated' and is 'temporary' for TQSE purposes when the HHG have been packed for moving and are unavailable to the residents.)" JTR C13110-A *quoting* GSBCA, 14888-RELO (May 10, 1999) (parenthetical sentence in original).

b. Termination of TQSA. The allowance terminates when the employee arrives at the new post. DSSR 031.11, -31.12, 121, 122, 124; *Albert Carter*, GSBCA 1435-RELO, 2001 GSBCA LEXIS 77, at 6-7 (April 9, 2001). "TQSA [the overseas allowance] ... [a]nd TQSE [the State-side allowance] cannot be paid for the same time period." JTR C5358-C1.

c. Termination of TQSA & Separate Departure Dates for Sponsor & Dependents & Using CONUS TQSE to Cover OCONUS Expenses. There is no requirement for the sponsor and dependents to travel together, but where the OCONUS sponsor has departed ahead of the family and begins work at the CONUS PDS, "the [TQSA] allowance terminates when the employee arrives at his new post." *Albert Carter*, GSBCA 1435-RELO, 2001 GSBCA LEXIS 77, at 7 (April 9, 2001). The GSBCA suggested that if the sponsor was still in temporary quarters and on TQSE allowance in CONUS, then expenses incurred by the OCONUS family in temporary quarters might be reimbursable as TQSE. *Albert Carter*, GSBCA 1435-RELO, 2001 GSBCA LEXIS 77, at 8 (April 9, 2001).

(1) Discussion. There is nothing in the language of the statute, 5 U.S.C. 5724a(c), or in the JTR, at C13105-C13120, that would prohibit an employee on TQSE in the States, from including in the TQSE claim, expenses incurred by dependents in a foreign area who are also in temporary quarters pending their PCS transportation. Indeed, one provision discussing TQSE is a positive indication it could be done. "The temporary quarters location is within reasonable proximity of the old PDS (which may be anywhere in the world) and/or the new PDS (which must be in CONUS or a non-foreign OCONUS area ... ." JTR C13115-A.5 (parenthetical comments in original). That the old PDS could be "anywhere in the world" would cover overseas locations. The JTR provision on the actual expense method of computing TQSE allows, "The employee may occupy temporary quarters at one location while dependents occupy temporary quarters at another location." JTR C13205-C.2. In discussing the computation of TQSE(AE) the JTR states "The per diem rates used for computation are: ... b. OCONUS (non-foreign OCONUS **and foreign area**). The PDS locality (not the lodging location) per diem rate in effect ... ." JTR C13225-A.2 (parenthetical comment in original, emphasis added). The significance of the emphasized text is that TQSE is that although TQSE is not the allowance claimed for overseas temporary quarters, the JTR is specifying the per diem rate to be used if the

employee otherwise qualifies for TQSE in the States but a family member remains overseas. Further, it is even possible that the TQSE could be in a location other than the old or new PDS, e.g., near where an overseas dependent is going to school. But this must be specifically approved by the Authorizing Official. JTR C13115-B.

(2) Nevertheless, before attempting such a claim, the employee should get the views of the State-side approving official (AO) in advance - they AO may want a formal opinion from the GSBCA before approving expenses incurred overseas for payment as TQSE.

5. Employees living on TQSA are not eligible for COLA. 5 U.S.C. 5924(1). Nor is an employee on TQSA eligible for a Post Allowance. DSSR § 127.

6. TQSA Rates on Departure.

   a. For the First 30 days. The initial occupant gets 75% of per diem, for each additional family member age 12 or over gets 50%, and those under age 12 get 40%. DSSR § 124.31.

   b. For the Second 30 Days (only allowed due to compelling reasons), the initial occupant gets 65% of per diem, for each additional family member age 12 or over gets 45%, and those under age 12 get 35%. DSSR § 124.32(1).

   c. For the Third 30 Days (only allowed due to compelling reasons), the initial occupant gets 55% of per diem, for each additional family member age 12 or over gets 40%, and those under age 12 get 30%. DSSR § 124.32(2).

   d. As with the rates upon arrival, if the employee occupies no-cost quarters, the allowance drops to actual meal, laundry and dry cleaning expenses at the maximum rate for the first 30 days. DSSR § 124.33. And where the temporary lodging facilities are limited and very expensive, the rate payable for the first 30 days can be maintained. DSSR § 124.34.

7. Submit an SF-1190 and a TQSA Worksheet DSSR 120. Hotel receipts are required along with a certification for meals and laundry expenses. Receipts may be required for individual meals over a certain amount. While a SF-1190 is preferred, if the employee submits a voucher for payment “with the information that is needed in order to review his

claim," then at least as far as the GSBCA is concerned, an identifiable claim has been filed with the agency. *Albert Carter*, GSBCA 1435-RELO, 2001 GSBCA LEXIS 77, at 5 (April 9, 2001).

D. Transportation Expenses.

1. On return from OCONUS, an agency may pay "these expenses" (travel and transportation expenses employee and employee's immediate family, HHG and personal effects) from employee's OCONUS post of duty to his place of actual residence at the time of assignment to duty OCONUS. 5 U.S.C. 5722(a)(2). The return expenses can only be paid:

   - After the individual employed in a DOD teaching position has served for a minimum of one school year. 5 U.S.C. 5722(c)(2) (except if a substitute);

   - Or if otherwise employed, if the individual has served "not less than one nor more than 3 years prescribed in advance by the head of the agency." 5 U.S.C. 5722(c)(1).

   "[U]nless separated for reasons beyond his control which are acceptable to the agency concerned. These expenses are payable whether the separation is for Government purposes or for personal convenience." 5 U.S.C. 5722(c).

2. Where the employee fails to stay at the overseas post for the minimum time in the service agreement, agency may pay for transportation expenses only when the employee leaves for reasons beyond the control of the employee and the reasons are acceptable to the agency. *Ms. Roberta B.*, 15320-RELO Aug 3, 2001.

   a. Determination of whether to release employee from service abroad early is a matter of agency discretion. That determination will not be overturned by GSBCA unless the agency determination was arbitrary and capricious. *Ms. Roberta B.*, 15320-RELO (GSBCA Aug 3, 2001).

E. Expenses Upon Return to CONUS. 5 U.S.C. 5724a, 5738.

1. Temporary Quarters Subsistence Expenses (TQSE). 5 U.S.C. 5724a(c). These expenses **may** be paid when the employee transfers in the interests of the government. 5 U.S.C. 5724a(c)(1). TQSE is for temporary quarters and subsistence expenses (including food and other necessities). JTR C13110. The JTR emphasizes that, "TQSE is a ***discretionary, not***

mandatory, allowance ... . TQSE must be authorized before temporary quarters are occupied and ***may not be approved for any days that have passed before TQSE is authorized***." C13105, *citing* FTR 302-6.7 (emphasis in original).

a. Terminology - The "temporary quarters allowance" in CONUS prior to departure for an overseas PDS is the Foreign Transfer Allowance (FTA). 5 U.S.C. 5924(2). Upon arrival at an overseas PDS the temporary quarters allowance is the Temporary Quarters Subsistence Allowance (TQSA-Arrival). 5 U.S.C. 5923(a)(1)(A). TQSA is also available on departure from the foreign PDS (TQSA-Departure). 5 U.S.C. 5923(a)(1)(B). While on return to the United States, the allowance is the Temporary Quarters Subsistence Expense (TQSE). 5 U.S.C. 5724a(c)(1)(A).

b. Actual Expense TQSE & Fixed TQSE. There are two types of TQSE, actual expense reimbursement (TQSE(AE)) and fixed amount payment (TQSE(F)). JTR C13105-C. The biggest difference between the two types is that TQSE(AE) may last up to 120 days but requires a review of claims and receipts, while TQSE(F) is a lump sum authorized up to a maximum 30 days and the employee may keep any excess.

c. Eligibility for TQSE.

(1) The following conditions must be met:

(a) The employee signs a TA. JTR C13115-A.1.

(b) A PCS is authorized and the new PDS is in CONUS (the old PDS can be anywhere in the world). JTR C13115-A.2. It must be a transfer, TQSE is not available for temporary quarters occupied for an evacuation or other reason not related to a transfer. JTR C13115-A.4. Further, the JTR specifically states that TQSE cannot be used for vacation purposes or any other reason unrelated to a PCS. JTR C13115-B Note, *citing* FTR 302-6.9.

(c) The old and new PDSs must be more than 50 miles apart. JTR C13115-A.3.

(d) "The temporary quarters location is within reasonable proximity of the old PDS (which may be anywhere in the world) and/or the new PDS (which must be in CONUS or a

non-foreign OCONUS area) ... ." JTR C13115-A.5 (parenthetical comments in original).

(e) TQSE must begin within two years of the employee reporting for duty at the new PDS, extensions are possible. JTR C13115-A.6. In other words, the employee who is in temporary quarters can decide when the allowance starts, e.g., for example, if the employee has traveled ahead of the family, the employee could begin the TQSE reimbursement period when the rest of the family joins the employee in temporary quarters at the higher, with dependent, rate. *See Larry A. Semm*, 16267-RELO (GSBCA Dec. 10, 2003).

(2) TQSE is NOT authorized for the following:

(a) A new appointee assigned to a first PDS. JTR C13115-C.1.

(b) Employees transferring to a foreign PDS. JTR C13115-C.2. (Employees transferring to a foreign PDS get TQSA. See the discussion at page 191.)

(c) Employees performing RAT, except when the return is to specified non-foreign OCONUS locations. JTR C13115-C.3.

(d) Employees assigned to an OCONUS PDS returning to actual residence for separation. JTR C13115-C.4.

(e) Employee authorized dependent travel to a training location instead of per diem. JTR C13115-C.5.

(f) After the employee occupies permanent quarters. The reason why the employee moves into permanent quarters is irrelevant. JTR C13115-C.6, *citing Ingolf C. Hack*, 15569-RELO (GSBCA July 12, 2001) (the leading case on the topic).

(i) In *Ingolf C. Hack*, the employee had moved with his family from Puerto Rico to New Jersey and checked into a hotel. Two days later the employee entered into a contract to purchase a residence. After three weeks in the hotel, the hotel's management informed them the hotel was reserved for the weekend and they would have to find other quarters. Unable to find an available hotel, the employee rented the house he had under

contract to purchase and moved in. Because the house was without appliances or furniture, the family could not take meals there and rented furniture. A month later their HHG were delivered. The employee claimed TQSE through the date before the furniture was delivered. The GSBCA determined he was eligible for TQSE up to the date the employee moved into what would become his permanent residence. "The pertinent provision of the FTR provides that the period of eligibility for reimbursement ends at midnight on the earlier of (a) the day preceding the day the employee or any member of the employees immediate family occupies permanent residence quarters or (b) the day the employee's authorized period for claiming actual TQSE expenses expires. 41 CFR 302-5.108 (2000). When a transferred federal employee finds a permanent residence and continuously rents that residence until he or she can purchase it, the Board has consistently affirmed agency decisions which consider the residence permanent the moment claimant moves into it." *Ingolf C. Hack*, 15569-RELO, 2001 GSBCA LEXIS 176, at 3-4 (GSBCA July 12, 2001), *citing Shane C. Jones*, 15462-RELO (GSBCA Apr. 19, 2001); *Glenn Baker*, GSBCA 14221-RELO; *Nancy J. Scheid*, GSBCA 14392-RELO. "The rule applies regardless of the extenuating circumstances leading to the early occupancy of the permanent residence. *Baker* (employee fled temporary quarters in high-crime area); *Scheid* (short-term rental of permanent residence until house at old station sold). We understand the circumstances that caused claimant to leave temporary quarters early, but those circumstances do not permit us to allow reimbursement that is contrary to regulation." *Ingolf C. Hack*, 15569-RELO, 2001 GSBCA LEXIS 176, at 3-4 (GSBCA July 12, 2001).

(ii) Mr Mizani transferred from Korea to New Mexico and was authorized TQSE. Upon his arrival, he moved into temporary quarters and a week later, moved into a house he owned, renting furniture until the HHG arrived over a month later. The GSBCA determined that he was entitled to TQSE only for the week in temporary quarters, "Although he furnished his permanent quarters with rented furniture, this made the quarters no less permanent." *Mehdi Mizani*, 15819-

RELO, 2002 GSBCA LEXIS 115 (GSBCA June 6, 2002).

Comment: These cases are an excellent example of employees doing the right thing, and saving the government some money along the way, only to lose their eligibility for what would otherwise be clearly warranted temporary quarters related expenses. The result is due, not to the GSBCA being mean-spirited but because the rules generally flow from fiscal law which firsts asks, "What is the authority for spending the money?" Here, the FTR requires that TQSE end when the employee moves into permanent quarters - the statute simply says that reimbursement for subsistence expenses is allowed "while the employee or family is occupying temporary quarters ... ." 5 U.S.C. 5724a(c)(1)(A).

(iii) In *Mehdi Mizani* the GSBCA noted its decision was consistent with the *Ingolf C. Hack* decision and a long line of GAO cases citing *Reginald Cutter*, B-260765 (Dec. 14, 1995); *Robert E. Hodge*, B-165500 (Nov. 22, 1968) (citing decisions). Further, the GSBCA acknowledged in *Ingolf C. Hack* that its position on TQSE was seemingly inconsistent with a case allowing "departure" TQSE where the employee and family had remained in the quarters following the HHG move but ate at restaurants. Despite the FTR's requirement that the employee "vacate" the residence, following a line of GAO decisions, the GSBCA allowed departure TQSE holding "that claimant and his family had constructively vacated the residence." The GSBCA distinguished *Hack* on the basis that the employee had continued to remain in the permanent residence while the in *Griffin* case the employee and family left the residence. *Ingolf C. Hack, citing Gordon Giffin*, GSBCA 14425-RELO.

(iv) One exception. "[D]ue to the timing of his arrival at his permanent station, an employee spent the weekend in an unfurnished apartment that was to become his permanent quarters and then moved into temporary quarters. We concluded that claimant did not intend to move permanently into the apartment at the time of his weekend sojourn and was entitled to TQSE reimbursement for his stay in the temporary quarters after he had left the apartment. *Ingolf C. Hack*, 15569-RELO, 2001 GSBCA LEXIS 176, at 5 (GSBCA July

12, 2001), *citing Gerald Taylor*, GSBCA 15251-RELO.

(3) The JTR states that as a matter of policy, authorizing officials should deny TQSE if the employee or a spouse made a house-hunting trip to the area or if previous TDY or permanent assignments to the new PDS have enabled the employee to make arrangements for adequate, permanent quarters. JTR C13115-D.

(4) TQSE may not be paid when the employee is receiving any other subsistence expense allowances, e.g., TQSA. This restriction does not apply to a COLA paid under the DSSR, or BAH, OHA or BAS paid to a member of the Uniformed Services who is the spouse of an employee authorized TQSE. JTR C13120, *citing* 52 Comp. Gen. 962 (1973). Neither does this restriction apply when the employee is sent TAD and reasonably retains the TQSE quarters while in separate lodging during the TAD. JTR C13205-C.2.c(3), *citing Paul G. Thibault*, 69 Comp. Gen. 72, 1989 U.S. Comp. Gen. LEXIS 1478 (Nov. 9, 1989) (A five-day TAD while in TQSE, where he needed a place to store the bulk of the belongings he carried with him when he PCS'd and he was informed by the lodging manager that, if he gave up his room during his period of temporary duty, he might not be able to reacquire it or another room upon his return.).

(5) Note: Where an employee has departed OCONUS traveling ahead of the family and started work at the new PDS (which prevents any or further TQSA for the family members left behind) the GSBCA suggested, that if the employee was authorized TQSE at the new CONUS PDS, and was still in temporary quarters in the States while his family was in temporary quarters OCONUS, that he might be able to claim their expenses as TQSE. See discussion at page 191.

d. TQSE(AE). An actual expense allowance based on the standard CONUS for any CONUS locality and the PDS locality per diem rate for temporary quarters located in a non-foreign OCONUS location. JTR C13205.

(1) TQSE must be authorized in advance. After the fact authorization is not allowed. JTR C13205-B.1.

(2) The authorizing official determines if TQSE is needed and the duration (not to exceed 120 days) - not the employee. JTR C13200, C13205-B.2.

(3) Prerequisites to TQSE. When the TQSE allowance has been authorized in a PCS travel authorization and the employee has signed a TA. The employee must occupy temporary quarters within two years of the employee reporting for duty at the new PDS. JTR C13205-C.1.

(4) TQSE-Duration - The 120 Day Limit for the Employee & Dependents. While the employee and dependents may occupy temporary quarters at different locations, the "period of temporary quarters runs concurrently for the employee and all dependents." JTR C13205-C.2. In other words, if the employee moves into temporary quarters first and five days later he is joined by his dependents, the 120 days for the employee and the family begins the day the employee moved into temporary quarters - the dependents do not get a period that ends five days later.

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(5) TQSE(AE) - Termination. TQSE ends when the employee or any dependent occupies permanent quarters or the authorized time period expires, whichever occurs first. JTR C13205-C.3.

(6) TQSE- Duration - "Interruption" - Time That Does Not Count Against the 120 Limit. Included in this section of the JTR is an emphasized statement that "***TQSE(AE) must never be paid for more than a total of 120 days.***" JTR C13210-B.4 (emphasis original).

(a) When the employee and dependents move out of the temporary quarters due to (1) travel between the old and new PDS (actual travel time), or (2) necessary official duties such as a TDY or military duty, the actual duty days and the actual travel time "not in excess of authorized allowable travel time" does not count against the 120 days. JTR C13205-C.2.a, .c. "Exceptions are not made if dependents occupy temporary quarters ... during the TDY or military duty training assignment." JTR C13205-C.2.c.(1). Considering the warning above, the JTR is saying that TQSE is limited to a maximum of 120 days but the days don't need to be consecutive.

(b) The 120 day time period can be "interrupted," i.e., extended for "Non-official necessary interruptions such as hospitalization, approved sick leave, or other reasons beyond the employee's control that are acceptable to the AO." JTR

C13205-C.2.a.(3). It isn't clear if the employee and the family have to vacate the temporary quarters during this period - unlike periods on TDY or military leave, the regulation doesn't require it - nor is it clear if the agency would pay for the quarters and food for example, while the employee was on approved sick leave. In any event, given the warning above, it is likely that this interruption would only apply where the AO had initially authorized less than 120 days TQSE. For example, if 60 days of TQSE was authorized and the employee was on sick leave for 5 days, then the 60 day period would be "interrupted" for 5 days even though 65 days of TQSE would be paid. But this would not be possible if the employee had 120 days TQSE and wanted to add on 5 days for a period of sick leave.

(7) TQSE(AE) Duration - Justification for the Additional 60 Days. Actual subsistence expenses may be paid for a period up to 60 days. 5 U.S.C. 5724a(c)(1)(A). This period may be extended up to an additional 60 days if there are compelling reasons for the continued occupancy of temporary quarters. 5 U.S.C. 5724a(c)(1)(B). "TQSE(AE) may be authorized only for the time period determined necessary by the AO ... ." JTR C13205-B.2. The employees request for additional time must be in writing. JTR C13205-B.2. The AO decides whether to grant an additional time beyond the initial 60 days on TQSE on a case-by-case basis. JTR C13210-A. The AO is to consider the following factors (note, time spent at work clearing up the backlog for a gapped billet isn't one of the reasons although it could fit under the last one):

(a) Delayed shipment or delivery of HHG to the new residence due to ... (the JTR goes on to list a series of reasons, presumably if the employee's reason isn't in the list it shouldn't matter - its not like the employee has any control over a HHG delivery). JTR C13210-B.1.a.

(b) Delayed occupancy of new permanent quarters because of unanticipated problems such as unforeseen delays (is there any other kind?) in settlement or construction. JTR C13210-B.1.b.

(c) Inability to locate permanent quarters adequate for family needs because of housing conditions at the new PDS. JTR C13210-B.1.c.

(d) Sudden illness, injury, or death of the employee or immediate family members. JTR C13210-B.1.d.

(e) "Similar factors." JTR C13210-B.1.e.

(8) TQSE(AE) - Qualifying For TQSE & Availability of Permanent Quarters. Quarters occupied temporarily qualify for TQSE within the available time limit where the employee's permanent quarters remain occupied by a tenant, require repairs or alterations that have not been completed or are under construction. JTR C13205-B.5.

(9) TQSE(AE) - Qualifying for TQSE When the Temporary Quarters Become Permanent Quarters. Quarters initially occupied on a temporary basis may qualify for TQSE even though they eventually become the employee's permanent quarters. The decision rests with the AO who needs to consider the following factors: the duration of the temporary lease and the length of time the employee occupied the quarters, whether a "HHG movement into the quarters" was made during the temporary lease, the quarters type, expressions of intent by the employee, and the employee's attempts to secure a permanent dwelling. JTR C13205-B.6. The agency must consider all these factors. *Felicia D. Dejesus-Walters*, 15986-RELO, 2003 GSBCA LEXIS 35, at 4 (GSBCA February 24, 2003). One factor, by itself, will not render a residence "temporary" or "permanent" for the purpose of determining TQSE eligibility. *Keith E. Kuyper*, 5839-RELO, 2002 GSBCA LEXIS 142, at 4 (GSBCA July 16, 2002).

(a) Example Where TQSE(AE) Authorized. *Felicia D. Dejesus-Walters*, 15986-RELO, 2003 GSBCA LEXIS 35 (GSBCA February 24, 2003) (cited at JTR C13205-B6). Employee PCS'd with her husband from Texas to Maryland. She was authorized 60 days TQSE, with approved 30-day increments up to 120 days. They stayed four days in a hotel and then leased a one bedroom apartment, where she remained through the closing on a new residence almost six months later. The lease was for one year, terminated at the employee's option on 60 days notice. The agency denied TQSE for the period in the apartment based primarily on the duration of the lease and the mistaken belief that her HHG had been delivered. The GSBCA authorized TQSE on the following:

- The employee owned two houses, one in Texas and the

other in Florida, and she made "vigorous and sustained efforts" to sell the houses including a substantial price reduction on the house in Texas which she was able to sell approximately six months after the move. *Id.*, at 3, 5-6.

- Before and during the TQSE period the employee had "made extensive ongoing attempts to secure permanent quarters" including putting a contract on a town home under construction, but since the completion date was beyond any possible HHG temporary storage entitlement, the employee located a second, completed, residence which was due to close six months after the PCS. *Id.*, at 2-3, 6.

- The GSBCA disagreed with the agency's assertion that because the employee had to sell or rent two houses as a precondition to purchase a new one that the stay in the apartment was indefinite - GSBCA noted that the requirement to sell or rent the houses related only to obtaining a particular type of financing - a VA loan. *Id.*, at 6, *distinguishing Keith E. Kuyper*, 5839-RELO, 2002 GSBCA LEXIS 142 (GSBCA July 16, 2002).

- The fact that the temporary quarters were occupied for a lengthy period of time, here, nearly six months, does not automatically mean the quarters were not temporary, nor does the signing of a one-year lease disqualify the employee from TQSE, particularly where here, the employee could cancel the lease at their option with 60 days notice. *Id.*, at 5-6, 6.

- Summary: The primary factors for the employee was that she had not moved her HHG into the temporary quarters; she had made vigorous and sustained efforts to sell two houses; she had made extensive on-going efforts to secure permanent quarters; and the lease of the temporary quarters could be cancelled at the employees option. *Id.*, at 6.

(b) Example Where TQSE(AE) Denied. *Keith E. Kuyper*, 5839-RELO, 2002 GSBCA LEXIS 142 (GSBCA July 16, 2002). The employee PCS'd with his family from Pennsylvania to Georgia with an authorization for up to 90 days of TQSE. The family moved into temporary quarters

on June 12 and moved out 31 days later on July 12 into the leased "Barnesville" residence, the day before having taken delivery of his HHG there. The lease history of the Barnesville residence was rather confused. On June 14, he signed a lease beginning 23 July and ending 3 years later on 22 July. Yet the employee also claimed to have made two month-to-month payments from 10 July to August and from 10 August to 9 September. His TQSE claim included the first 7 weeks he spent in the Barnesville residence which part the agency denied on the basis that the employee had not proved the residence was temporary, the first month-to-month receipt was "questionable" and the second was from a firm the agency could not find, and he had taken delivery of his HHG. The GSBCA agreed. "[C]laimant's move of household goods and his family, and claimant's entering a [three-year] lease ... show the intent to stay in the Barnesville residence, more or less permanently. Claimant's hope to be able to purchase a house when circumstances permit is too vague to qualify the residence as temporary quarters for TQSE purposes. In short, the combination of factors demonstrates that the agency acted reasonably." *Id.*, at 5 (citation omitted).

(10) TQSE(AE) Computation. The JTR contains an extensive discussion of how TQSE(AE) is computed at JTR C13225.

e. TQSE(F). TQSE(F) is a trade - the agency is offering up to 30 days TQSE in a lump sum, "no questions asked" if the employee uses the allowance for temporary quarters or not. The employee is saved the hassle of tracking the actual expenses and submitting multiple vouchers. The up-side for the agency is that it saves administrative expenses while up-side for the employee is that the employee does not have to give back TQSE(F) not used in temporary quarters. The down-side for the employee is that if the employee is not able to move into permanent quarters in less than 30 days, the employee is liable for the additional expenses.

(1) The AO decides whether to offer the employee TQSE(F). JTR C13302-3.

(2) Choosing TQSE(F). Once the employee selects a TQSE method (fixed or actual expense), the selection may not be changed. Where the employee's PCS orders authorize TQSE but don't specify which type, and the AO inadvertently fails to offer the employee TQSE(F) then the agency may retroactively correct the

employees PCS travel authorization to permit TQSE(F) if requested by the employee. JTR C13305-3 & second note.

(3) Timing & TQSE(F). First, TQSE(F) is like any TQSE, it cannot be authorized after the fact. JTR C13305 Note. Once authorized, it is up to the employee to decide when the TQSE starts, as long as it is within the two year time-limit after travel can begin. Where the employee is still in temporary quarters, and his family is delayed joining him, the employee can begin the TQSE period not when he first entered TQSE but later when the rest of the family joined him (at the higher rate). JTR C13310-B, *citing Larry A. Semm*, 16267-RELO (GSBCA Dec. 10, 2003).

(4) Thirty days is the maximum duration of TQSE(F) - but the AO may offer a shorter period. JTR C13302-5. If the employee agrees to TQSE(F), the employee cannot be paid any additional TQSE if the amount paid is inadequate to cover expenses. JTR C13302-6. Even where agency officials erroneously told the employee the time could be extended beyond 30 days and the employee relied on the advice to his detriment, the time limit cannot be extended. JTR C13310 Note.

(5) The amount of TQSE(F) is based on the per diem rate at the new PDS on the date the TQSE(F) offer is accepted by the employee. JTR C13302-3, C13305-2. The amount of the lump sum is not changed by any increase or decrease to the new PDS per diem rate after the employee accepts the offer. JTR C13305.

(6) If the TQSE(F) exceeds the employee's actual expenses, the employee does not have to pay back the excess amount. JTR C13302-7, *citing* GSBCA 1608-RELO (Oct. 24, 2003); GSBCA, 16408-RELO (July 14, 2004); GSBCA 16420-RELO (July 15, 2004).

(7) The employee does not need to submit receipts and supporting documents for a TQSE(F) payment. JTR C13315.

(8) The computation of TQSE is described at JTR C13320.

f. Who Determines Actual v. Fixed TQSE? Here is another situation where portions of the JTR seem to conflict, but the JTR plainly states that while it is up to the authorizing official to extend an offer of TQSE(F), it is the employee who decides whether to use TQSE(F). The initial discussion of TQSE states, "After a determination is made that TQSE is necessary, TQSE on an actual expense basis cannot be

denied because the employee does not want TQSE on a fixed basis." JTR C13105. But the opening paragraph discussing Actual Expense TQSE states, "The AO, ***not the employee***, determines if TQSE(AE) is necessary." JTR C13200 (emphasis in original). This should be understood to mean that it is the AO which decides if TQSE itself is necessary, not that the AO gets to decide if the actual expense TQSE is necessary versus the fixed TQSE. The discussion of fixed TQSE states gives the final answer, "The employee may decline the TQSE(F) offer and choose to be reimbursed by TQSE(AE) if the AO authorizes/approves TQSE." JTR C13302.3.

2. Miscellaneous Expenses. An employee who is otherwise qualifies for reimbursement of expenses under 5 U.S.C. 5724a(a)-(e) or transportation expenses under 5 U.S.C. 5724(a), is entitled to an amount for miscellaneous expenses not to exceed one week's basic pay if the employee is without family or not to exceed two weeks' basic pay if the employee has an immediate family, capped at the maximum rate payable for a GS-13. 5 U.S.C. 5724a(f).

3. Expenses for Sale & Purchase of Residence or Unexpired Lease. 5 U.S.C. 5724a(d)(2). Unless the employee returns to his/her duty station from which they left from the overseas tour (the "old official station" not the OCONUS duty station), "an agency shall pay ... expenses required to be paid by the employee of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old official station ... ." 5 U.S.C. 5724a(d)(2), 5724a(d)(2)(A). And, "expenses required to be paid by the employee ... [for] purchase of a residence at the new official station within the United States." 5 U.S.C. 5724a(d)(2)(B).

   a. Allowable Expenses.

WARNING: Reimbursement of expenses for the sale or purchase of a residence are only for a sale (or settlement of an unexpired lease) or purchase transaction that occurs **after the official notification of the employees return to the United States.** 5 U.S.C. 5724a(d)(3).

   (1) Reimbursement is authorized regardless of whether the title to the residence or the unexpired lease is in the name of the employee alone, the joint names of the employee and a member of the employee's immediate family, or in the name of the employee's immediate family alone. 5 U.S.C. 5724a(d)(6).

   (2) Reimbursement for brokerage fees and other expenses for the sale of a residence at the old official station (not at the OCONUS location) may not exceed those customarily charged in the

locality. 5 U.S.C. 5724a(d)(4). Reimbursement cannot exceed 10% of the sale price. 5 U.S.C. 5724a(d)(7)(A).

(3) Reimbursement may not be made for losses incurred on the sale of the residence. 5 U.S.C. 5724a(d)(5).

(4) Reimbursement for purchase of a residence at the new duty location cannot exceed 5% of the purchase price. 5 U.S.C. 5724a(d)(7)(B).

b. Agency Option to Provide Property Management Services. Instead of paying for the eventual expenses of the sale of the employee's residence, the agency may instead pay for the expenses of a property management service. In order to exercise this option the agency must determine that the overseas transfer of the employee is "advantageous and cost-effective for the Government." 5 U.S.C. 5724a(d)(8). The payments for the property management service will terminate with the employee returns to an official station within the United States. 5 U.S.C. 5724a(e).

F. Return Rights to Position & Pay.

1. Return Rights As to Position. Competitive service employees assigned to overseas locations have "the right to return to a position in the United States" if they "satisfactorily complete[ ] such duty" and apply "not later than 30 days after ... completion of such duty, for the right to return ... ." 10 U.S.C. 1586(b)(2) & (3). The Secretary of the department concerned may waive these requirements (but not that performance be in the competitive service) "in those cases in which application of such [requirements] ... would be against equity and good conscience or against the public interest." 10 U.S.C. 1586(b). An employee removed upon completion of the overseas assignment because of his failure to exercise his reemployment rights was afforded all the due process required and was not deprived of property rights in violation of the Constitution. *Harris v. United States*, 640 F.2d 1309 (Ct.Cl. 1981), *cert. denied* 454 U.S. 820.

2. Return Rights as to Pay. Limited to the competitive service, "The right to return to a position in the United States ... shall be without reduction in the seniority, status, and tenure held by the employee immediately before his assignment to duty outside the United States ... ." 10 U.S.C. 1586(c). "Each employee who is placed in a position" upon return to the United States, "shall be paid at a rate of basic pay which is not less than the rate of basic pay to which he would have been entitled if had not been

assigned to duty outside the United States." 10 U.S.C. 1586(d). The implementing DOD CPM explicitly addresses step increases, "the employee is entitled to a rate of basic pay not less than the rate to which he or she would have been entitled ... including any applicable within-grade increase(s)." DOD 1400.25-M, SC 531.2.3 (USD(P&R) Dec 1996, change 1, July 25, 1997).

a. The only exception is where a RIF is required upon return to the States. 10 U.S.C. 1586(d), *referencing* (c)(5). The employee is to be placed in the position held immediately before the overseas assignment. If such position no longer exists, or with the employee's consent, the employee can be returned to another State-side position. 10 U.S.C. 1586(c)(1) & (2). A challenge to Army regulations on reemployment rights was denied. *Harris v. United States*, 640 F.2d 1309 (Ct. Cl. 1981), *cert denied* 454 U.S. 820.

b. The fact than employee sought out the overseas assignment does not affect his return rights. *Dancy v. United States*, 668 F.2d 1224 (Ct.Cl. 1982).

c. Employees who go to a higher grade overseas have no MSPB appeal rights to contest their being "demoted" when they return to their State-side position. *Fromer v. Dept. of Defense*, 29 M.S.P.R. 481 (1985); *Walton v. Dept. of Navy*, 42 M.S.P.R. 244 (1989).

3. Employees displaced by a returning employee are to be placed in another position at the same grade in the same geographic area. If the employee cannot be so placed, the employee can be reassigned to another position or separated. 10 U.S.C. 1586(e). The displaced employee does not have standing to challenge his being bumped. *Coleman v. Dept. of Navy*, 24 M.S.P.R. 426 (1984).

4. Positions in Alaska and Hawaii count as overseas assignments. 10 U.S.C. 1586(f); E.O. 10895 (Nov. 25, 1960, 25 Fed. Reg. 12165, *found at* 10 U.S.C.A. 1586 note (West 1998).

G. <u>Pay Retention Upon Return From Overseas</u>. Pay retention will be extended when an employee is reduced in grade upon return from an overseas assignment in accordance with the terms of a preestablished agreement. Memorandum from DASD(CPP), "Subj: Grade and Pay Retention" ¶b(3) (Feb 13, 1987), *reprinted in* OCPMINST 12536.1 (Supplement to FPM 990-2).

1. This includes employees who are:

   a. released early from their TA early due to a management initiated action, or

   b. employees who have served more than one year under a TA and who return from overseas early because of compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or mental health or circumstances over which the employee has no control.

2. Also included are nondisplaced overseas employees with no obligation to return who are covered by Part I, Chapter 6, ¶ C3c of DOD 1400.20-1-M "DOD Program for Stability of Civilian Employment."

XXI. MOVEMENT BETWEEN FOREIGN AREAS.

A. Authorized Allowances. JTR C5010 Table 7.

1. Relocation Allowances the Agency Must Pay:

   a. Transportation & per diem for employee and immediate family. JTR Vol 2, Chapt 5, Part A.

   b. Transportation and temporary storage of HHG. JTR Vol 2, Chapt 5, Part D.

   c. Miscellaneous Expense Allowance (MEA). JTR Vol 2, Chapt 5, Part G.

   d. Non-temporary (extended) storage of HHG. JTR C5195-A.

   e. Relocation income tax allowance (RITA). JTR Vol 2, Chapt 16.

2. Relocation Allowances the Agency Has Discretion to Pay For:

   a. POV shipment. JTR Vol 2, Chapt 5, Part E.

   b. Property management services. JTR Vol 2, Chapt 15, Part B.

   c. TQSA. DSSR § 124.

B. **Approval Needed**. "Movements between foreign areas during the initial tour, including movement at the game [sic, same] duty location to another activity, of employees who have less than one year of service at their current overseas duty location are prohibited, unless concurred in by the losing activity, or the movement results in a promotion for the employee." OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-7a.

1. Its not clear if this provision:

   a. Applies during the, for example, entire initial 3-year tour, or is limited to the first year of a tour;

   b. Or if the first year limitation only applies to movements within the same location

C. **And the 5 Year Rule**. When the employees foreign service exceeds 5 years and the employee is covered by the 5 year limit, the major command of the losing activity must also approve the assignment. This authority may be redelegated. OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-7b.

D. **Transportation Allowances & Reassignment Between Overseas Locations**.

1. TQSE is not authorized, instead employees receive Temporary Quarters Subsistence Allowance (TQSA). TQSA is the temporary quarters allowance for departure from the foreign PDS (TQSA-Departure). 5 U.S.C. 5923(a)(1)(B) (for a period of not more than 30 days which may be extended up to 60 days, 5 U.S.C. 5923(b)). Upon arrival at the new OCONUS PDS the temporary quarters allowance is the Temporary Quarters Subsistence Allowance (TQSA-Arrival). 5 U.S.C. 5923(a)(1)(A) (for period not to exceed 90 days which may be extended up to 60 days, 5 U.S.C. 5923(b)).

   a. TQSA is payable if the employee is eligible for a Living Quarters Allowance (LQA). JTR C1003

      (1) LQA eligibility is described in DoD Dir 1400.25-M, SC 1250.5, and DSSR § 131.1

      (2) TQSA rules are in DSSR § 120.

2. No House-hunting Trip. Expenses of transportation of the employee and employee's spouse for travel to seek permanent residence quarters at a new official station is limited to where the official stations are located within the United States. 5 U.S.C. 5724a(b)(1).

XXII. RETURN TO OCONUS AFTER RETURNING TO THE UNITED STATES.

A. Basic Rule. DON employees who have returned to the United States following 5 years service in a foreign area, must complete 1 year of "U.S. residency" prior to serving another tour in a foreign area. OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8 "Residency Requirement." The Navy's instruction is consistent with the DOD policy that it "is neither cost-effective nor efficient to provide more than one PCS move to a DoD employee during any 12-month period." JTR C5005-C.

1. This rule also applies if the combined prior overseas service (presumably in the prior tour, not the person's entire career) and the proposed initial overseas tour will exceed 5 years.

2. The commanding officer of the "holding activity," i.e., the State-side activity, has the authority to waive the 1 year requirement.

B. Re-Transport of the Same HHG. If somehow, the OCONUS employee has been assigned to a CONUS PDS but before leaving OCONUS gets permission to extend at the OCONUS PDS, shipment of the HHG in the meantime will complicate the situation. HHG returned to CONUS or the actual residence may be reshipped back to the OCONUS PDS during a continuous period of OCONUS employment under the following conditions: the situation was beyond the employee's control; and the moves were authorized or approved **by the headquarters of the DOD agency**. No new service agreement is required for shipping the HHG back to the OCONUS PDS. JTR C5158.

XXIII. EARLY RETURN EMPLOYEES & DEPENDENTS, EMERGENCIES, DANGER & DEATH.

A. Management Directed Return of Employee From Overseas.

1. "The head of an overseas activity may direct the return of an employee at any time if the action is in the best interest of the Navy." OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8a [sic, 5-6a].

2. The grounds for directing the return of an employee from overseas is stated in OCPMINST 12352.1, CPI 352.8, subchapter 8-7 (March 11, 1988).

   a. In addition to the end of the employee's overseas tour or extension, employees can be directed to return:

      (1) "When the overseas activity determines the employee cannot adjust to the overseas area for reasons not related to performance." *Id*., at SC 8-7.a.(2).

      (2) When the employee's skills were not properly matched to the job requirements and there are no other duties to which the employee can be assigned. *Id*., at SC 8-7.a.(3).

      (3) When the employee fails to satisfactorily complete a supervisory or managerial probationary period during the initial tour. *Id.*, at SC 8-7.a.(4).

      (4) When the overseas activity determined the holding activity (e.g., the CONUS activity) knew of adverse suitability information about the employee at the time of the overseas assignment (and apparently failed to disclose that to the overseas activity). *Id*., at SC 8-7.a.(5).

      (5) In order to eliminate the need for a RIF. *Id*., at SC 8-7.a.(6). Which seems inconsistent with the information in paragraph 3 below.

   b. If the grounds for the return are SC 8-7.a.(2)-(6), both the overseas and holding activity (e.g., the CONUS activity where the employee came from) have to agree to the return. "If the holding activity disagrees, the case will be referred to the next higher echelon command of the holding activity for resolution." *Id*., at SC 8-7.b.

3. Management directed returns will not be used:

   a. Because the employee's position can be filled locally;

   b. "As a means of requiring an employee to return to the U.S. simply because the individual has been overseas for more than live [sic, five] years when the employee is exempt from returning under the rotation program."

c. In lieu of a RIF.

OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8b [sic, 5-6b].

4. Placement Into A Position Upon Return From Overseas. OCPMINST 12301.2 "Federal Personnel Manual (FPM) - Navy Supplement" ¶5-8c [sic, 5-6c].

a. May also involve waiving time remaining on a TA or denial of renewal agreement travel (RAT). *Id*.

b. Notify the employee to permit the individual to release within 45 days of designation of a stateside position. An employee who fails to accept a directed return will be separated. *Id*., at ¶5-8c(1) [sic, 5-6c(1)].

c. If the employee does not have return rights to a position, the return is through the PPP. Return may also be accomplished through reassignment to a position at an activity in the U.S. under the cognizance of the overseas major command. *Id.*, at ¶5-8c(2) [sic, 5-6c(2)]. For example, an overseas NAVSUP employee could simply be reassigned to a NAVSUP position in the States.

d. "When emergency situations require the immediate departure of the employee from the overseas area, after coordination with the cognizant major command, the overseas activity will give the employee the 30-day notice of adverse action and immediately return the employee to the U.S. where the adverse action will continue after the employee's return. The adverse action will be effected after the 30-day notice period." *Id*. at ¶5-8c(3) [sic, 5-6c(3)].

(1) Care must be used to insure the employees departure doesn't preclude the employee's ability to respond to the charges.

(2) Also, the provision would seem to preclude effecting an adverse action in less than 30 days.

B. Early Return of Dependents (ERD) From Overseas. 5 U.S.C. 5729(c) (The statute does not apply to Foreign Service employees.); JTR C7003-D.

1. For employees whose post is outside the continental United States, an agency "shall pay ... not more than once before the return to the United States ... the expense of transporting his immediate family and of

shipping his household goods and personal effects from his post of duty to his actual place of residence [in the United States] ... ." 5 U.S.C. 5729(a). The agency will do this when:

a. the employee "has acquired eligibility for the transportation" 5 U.S.C. 5729(a)(1); JTR C7003-D.1.a; or

b. "the public interest requires the return of the immediate family for compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or mental health, death of a member of the immediate family, or obligation imposed by authority or circumstances over which the individual has no control." 5 U.S.C. 5729(a)(2); JTR C7003-D.1.b.

2. Travel may be to the employee's actual residence or an alternate destination. JTR C7003-D.1. Expenses authorized for dependent travel from OCONUS areas are in JTR C1410-A and C1410-C. JTR C7003-G.

3. Early return of dependents can be used if there is a divorce or a dependent turns 21 while overseas. 41 C.F.R. 302-3.227 (divorce), 302-3.228 (turned 21); JTR C7003-D.4.

4. When an employee's dependent returns before the employee is eligible for return travel and for reasons other than those described above, the transportation expense is the employees' personal financial responsibility. JTR C7003-D.2. Where the employee has not acquired eligibility for transporting the family home or where there was no public interest basis for returning the family from overseas, the employee maybe reimbursed for the expenses of returning to the United States when the employee acquires eligibility for the transportation expenses. 5 U.S.C. 5729(b); JTR C7003-D.2.

5. Deadline for Starting Travel. Travel must begin before the end of the employee's current agreed-to tour of duty. In the case of an employee serving under a 1-year, 2-year or 3-year tour agreement, travel for the former dependents must begin before the end of the 1-year, 2-year or 3-year tour during which the divorce/annulment was finalized. If the employee is serving under an administrative extension of a tour, travel for the former dependents must begin before the end of the administrative extension in effect during which the divorce/annulment was finalized. JTR C7003-D.4.

C. Pay Allowances for Adverse & Dangerous Conditions.

1. Advance Pay for Medical Treatment. Up to three months advance pay can be paid to an employee hired with a U.S. government employee family preference, who is a U.S. citizen "officially stationed or located outside the United States" and requires medical treatment outside the United States for himself or a family member. 5 U.S.C. 5927(a)(2)(B).

2. Pay - Post Differential For Especially Adverse Conditions. An additional incentive of up to 15% above the normal 25% limit on a post allowance, is allowed "for an assignment to a post determined to have especially adverse conditions of environment." 5 U.S.C. 5925(b). May be paid:

   - For each assignment to such a post. 5 U.S.C. 5925(b)(1).

   - Periodically or in a lump sum. 5 U.S.C. 5925(b)(2).

   This allowance is also available to individuals on an extended detail to the location. 5 U.S.C. 5925(a).

3. Pay - Danger Pay Allowance. 5 U.S.C. 5928; DSSR §650.

   a. Conditions for Granting. An employee serving in a foreign area may be granted a danger pay allowance:

      - on the basis of civil insurrection, civil war, terrorism, or wartime conditions,

      - which threaten physical harm or imminent danger to the health or well-being of the employee.

      5 U.S.C. 5928. "These conditions do not include acts characterized chiefly as economic crime." DSSR § 652a.

      (1) A danger pay allowance is established by the Secretary of State when, and only when, civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well being of a majority of employees officially stationed or detailed at a post or country/area in a foreign area. DSSR § 652g.

      (2) The presence of nonessential personnel or dependents shall not preclude payment of an allowance under this section. 5 U.S.C. 5928. This was a change made in 1983 by Public Law 98-164. Nevertheless, the State Department continues to consider the

presence of nonessential personnel and dependents with respect to the amount of the danger allowance. DSSR § 652f.

b. Sense of Congress. "In recognition of the current epidemic of worldwide terrorist activity ... it is the sense of Congress that the provisions of section 5928 ... relating to the payment of danger pay allowance, should be more extensively utilized at United States missions abroad." Pub. L. 98-533 § 304, Oct. 19, 1984, 98 Stat. 2711.

c. Amount. The "amount of danger pay shall be the same flat rate amount paid to uniformed military personnel as imminent danger pay." DSSR § 652g. The total amount may not exceed 25% of basic pay, either alone or combined with a "Post Allowance for Living in an Especially Adverse Area" (which cannot exceed 15% of basic pay). 5 U.S.C. 5928, *referencing* 5 U.S.C. 5925(b); DSSR § 651a.

(1) State Department employees, by way of comparison, get danger pay at rates of 15, 20, or 25 percent. DSSR § 652f.

(2) The danger pay allowance is not part of the basic compensation for computing within-grade increases, merit pay increases or other bonuses. DSSR § 657.

d. State Department Controls. The State Department controls whether other agencies can provide a danger pay allowance to their employees.

(1) "Under circumstances defined by the Secretary of State, a danger pay allowance may be granted to civilian employees who accompany U.S. military forces designated by the Secretary of Defense as eligible for imminent danger pay." DSSR § 652g.

(2) "The Secretary of State will define the area of application for civilian employees ... ." DSSR § 652g.

(3) "Danger pay authorized under this subparagraph will not be paid for periods of time that the employee either receives danger pay ... that would duplicate political violence credit." DSSR § 652g.

(4) Exceptions. The Secretary of State may not deny a request by the DEA or FBI to authorize a danger pay allowance for any employee of such agency. 5 U.S.C. 5928 note.

e. State Department Reporting Requirements. When the allowance is initiated or terminated, the Secretary of State shall inform the Speaker of the House of Representatives and the Committee on Foreign

Relations of the Senate of the action and the justification.

4. Pay - Hostile Fire Pay. 5 U.S.C. 5949. May be paid at the "rate of $150 for any month."

   a. Conditions for Granting. The employee was:

      - Subject to hostile fire or mine explosions, 5 U.S.C. 5949(a)(1); or,

      - On duty in an area where there was an imminent danger of being exposed to hostile fire or mine explosions and other employees were subject to hostile fire or mine explosions. 5 U.S.C. 5949(a)(2); or

      - Killed, injured, or wounded by hostile fire, mine explosion, or hostile action. 5 U.S.C. 5949(a)(3). Where hospitalization results, the employee may receive hostile fire pay for not more than three additional months while the employee is hospitalized. 5 U.S.C. 5949(b).

   b. Limits on Granting. Hostile fire pay cannot be paid when the employee receives:

      - a Post Allowance "because of exposure to political violence." 5 U.S.C. 5949(c), *referencing* 5 U.S.C. 5925; or,

      - a danger pay allowance. 5 U.S.C. 5949(c) *referencing* 5 U.S.C. 5928.

5. Detail to Posts With Danger Pay & U.S. Troops Involved in Warfare. DSSR § 541. Applicable to State Department Employees (application to DOD employees is unknown).

   a. An employee who serves for a period of 42 consecutive days or more on detail at a hardship differential post (DSSR 511c) where there is widespread warfare, U.S. combat troop involvement in hostilities, and has a danger pay designation may be granted the hardship differential at the prescribed rate for the number of days served, beginning the first day of detail. *See* DSSR 920, footnote "n."

   b. The hardship differential eligibility shall continue during periods of leave and other absences from the footnote "n" posts, including travel to the U.S. for 30 days or less. Leave of 30 days or less will not interrupt the hardship differential for either eligibility or payment

purposes.

c. An employee on leave from a footnote “n” post for more than 30 days will be required to meet the 42-day eligibility requirement on return to a hardship differential post.

6. No Leave Charged for Absence. Leave may not be charged for an absence from duty, not to exceed one year, due to an injury incurred while serving abroad and resulting from war, insurgency, mob violence, or similar hostile action. 5 U.S.C. 6325(1). This exemption does not apply where the absence was the result of the “vicious habits, intemperance, or willful misconduct on the part of the employee.” 5 U.S.C. 6325(2).

7. Comparison to Combat Pay for Military. Actually, "combat pay" is something of a misnomer as there is no such specific allowance. Rather, "combat pay" is a collection of allowances military personnel can qualify for.

a. Tax Exemption - The Qualified Hazardous Duty Area Income Tax Exclusion. This is earned for the month by spending a minimum of a day in, or a mission over, the combat zone. 26 U.S.C. 112.

b. Hostile Fire/Imminent Danger Pay. All service members in Iraq qualify for this. Congress increased this pay from $150/month to $225/month in April 2003, retroactive to October 2002. This category of pay is earned by the month for spending a minimum of one day in the designated area. This pay was set to expire October 30, 2003, but was funded through October 2004 in an Iraq supplemental bill.

c. Hardship Duty Pay. All military personnel in Iraq qualify for this. It is $100 per month.

d. Family Separation Allowance. For service members with families. Congress increased the allowance from $100/month to $250/month in April 2003, retroactive to October 2002. Set to expire October 30, 2003, it was funded through October 2004 in an Iraq supplemental bill.

e. Related Category of Hazardous Duty Incentive Pay. This is a general category covering many different types of incentive pay. This pay is earned regardless of whether performed in a combat zone. The pay is generally paid at a rate of $150 per month to service members whose orders require them to participate in frequent and regular duties considered arduous or hazardous. It is typically prorated per day, that

is, a service member who performs these duties for less than a month would receive $5.00 per day. Examples of this type of pay are, Crew Member Flight Pay, Non-crew Member Flight Pay, Parachute Duty Pay, Demolition Duty Pay, Toxic Fuels Duty Pay, Dangerous Viruses Lab Duty Pay, and Chemical Munitions Pay.

D. Evacuations from Overseas Areas.

1. Transportation Expenses For Evacuation. When an employee is on duty in, or is transferred or assigned to duty, at a place designated by the head of the agency as a zone:

   - from which his immediate family should be evacuated; or

   - to which immediate family members are not permitted to accompany him;

   Because of:

   - military or other reasons which create imminent danger to life or property; or

   - adverse living conditions which seriously affect the health, safety, or accommodations of the immediate family.

   Government funds may be used to transport the immediate family and household goods and personal affects to a location designated by the employee. 5 U.S.C. 5725(a).

2. If the employee cannot designate a location, or it is administratively impracticable to determine his intent, the immediate family may designate the location. If the destination is also inside a zone into which movement of the family is prohibited, then the employee or his family may designate another alternative.

3. When the employee subsequently returns from the danger zone to a new permanent duty station, and his family is not excluded from the location, Government funds may be used to transport the immediate family and household goods and personal effects from their designated or alternate location to the new PDS. 5 U.S.C. 5725(b).

4. Who Has Authority To Order Evacuation of Employees and Dependents From a Foreign Area? Normally, the "decision to evacuate employees and/or dependents from a foreign area rests with the State Department."

JTR C12000 ¶B.1.

a. SECDEF Consulting With Secretary of State. "In appropriate circumstances, such as a Presidential declaration of national emergency or directed reinforcement of U.S. Armed Forces in a theater, or to accommodate force protection or anti-terrorism considerations, the Secretary of Defense, after consultation with the Secretary of State, may authorize the evacuation of all DoD noncombatants." JTR C12000-B.1.

(1) NOTE: The authority of the Secretary of Defense does not apply to the Defense Attaché Offices, Marine Security Guard Detachments, DoD elements or personnel that form an integral part of the U.S. Country Team, and others as determined between the Combatant Commander and the Chief of Mission. JTR C12000-B.1, *citing* Memorandum of Agreement Between DOS and DoD, 14 July 1998.

b. Combatant Commander, Senior Country Commander or Defense Attaché. "When U.S. citizens are endangered but timely communication with the State Department is not possible, or there is no State Department presence in the area concerned, and time and communications do not permit the Commander to receive authorization from the Secretary of Defense (USD (P&R)) without jeopardizing the U.S. citizens, the commander of the Combatant command or the senior commander in the country concerned or the Defense Attaché is responsible for authorizing or ordering an evacuation of the area." JTR C12000-B.1.

5. Where the Employee or Dependents Can Be Sent To. JTR C12000-B.2.

a. From the employee's PDS to a **Safe Haven** pending a determination as to their:

(1) return to the PDS from which evacuated;

(2) transfer or reassignment of the employee to another PDS;

(3) return to actual residence; or

(4) transportation to the final safe haven.

JTR C12000-B.2.

b. Rejoining the Family. If it is determined that the "employee and/or

dependents are not to return to the evacuated PDS, transportation for the employee and/or dependents and HHG may be authorized from the PDS or safe haven to the employee's next PDS." JTR C12000-B.2;

c. Where the employee was not serving under a transportation agreement, the employee and family would be returned to their "actual residence," i.e., their State-side residence. JTR C12000-B.2.

6. Third Country Nationals. On a case by case basis, as determined by the head of agency, third country national employees and/or their dependents should be considered for evacuation travel to their country of origin or point of hire rather than to other designated foreign or CONUS safe havens, if it is in the U.S. Government's interest and authorized by the Secretary of State. DSSR § 631a(4).

7. Safe Haven. JTR C12000-D.

a. "Safe haven" means:

- a location or place officially designated by the Secretary of State to which an employee and/or dependent(s) is ordered or authorized to depart. DSSR § 610 ¶l(1) ["L"].

- an alternate safe haven is a safe haven authorized through the Secretarial Process under individual circumstances when in the U.S. Government's interest. DSSR § 610 ¶l(2) ["L"], *reproduced at* JTR C12000 App. I, Part A.

b. The Typical CONUS Safe Haven. Typically, the designated safe haven will be "CONUS" with the member deciding the specific location. JTR C12000-D; DSSR chapter 600 Evacuation FAQS no. 3.

(1) Depending on how the evacuation is organized, the evacuee could make the decision on the final destination either when departing the PDS or at the entry station in the CONUS, e.g., flight arrives from overseas PDS at Norfolk, where evacuees are processed and evacuees make determination on final destination there.

(2) An evacuee is not required to remain at the official safe haven; however, SEA payments are based on the official safe haven location per diem rate. An evacuee can change safe havens to somewhere else in CONUS once during an evacuation. Transportation between safe havens may be authorized sparingly

through the Secretarial Process (JTR C12000-B2d) for reason(s) other than only personal preference. DSSR chapter 600 Evacuation FAQS no. 3.

c. When a limited evacuation is authorized/ordered (see JTR C12000-C3), the safe haven is the location of the nearest available accommodations, which may be Government quarters, determined to be suitable by the authority who ordered the limited evacuation.

8. Agency Reporting Requirements & Further Approval for Evacuation Benefits.

a. Fist Report is made when an evacuation is ordered/authorized to the head of agency who forwards a copy to the Department of State. The report must contain the following information:

(1) names of evacuated employees;

(2) names of evacuated dependents;

(3) feasibility of officially reassigning evacuated employees to other positions;

(4) number of evacuated employees and skills needed to reactivate the post; and

(5) any other facts or circumstances which may aid in determining whether or not evacuation payments are necessary beyond the first 60 days of the evacuation period.

DSSR § 624.

b. Second Report, similar to the first, this report is made 45 days after the evacuation. The purpose of the second report is to determine the number of evacuated employees who need to be retained as the civilian staff available for the performance of duty for whom evacuation payments may be continued beyond the first 60 days of the evacuation. DSSR § 624.

9. Work Assignments for Evacuated Employees. Evacuated employees at safe haven may be assigned to perform any work considered as necessary or required during the evacuation period without regard to the grades or titles of the employees. DSSR § 625.1. Failure or refusal to perform assigned work may be a basis for terminating further evacuation payments and/or taking disciplinary action. DSSR § 625.2.

10. Evacuations & Privately Owned Vehicles (POVs). The limit on shipping POVs is found at 5 U.S.C. 5727(a) which states that "an authorization in a statute or regulation to transport the effects of an employee ... at Government expense is not an authorization to transport an automobile" unless shipping the POV is "specifically authorized by statute." The statutes covering "emergency evacuations" don't mention shipment of POVs, consequently, the regulations state, "There is no authority to ship a POV in connection with an evacuation." JTR C12000-F; DSSR § 631b. Instead POV's may be put into "emergency storage" and subsequently shipped to the employee's new PDS.

    a. Emergency Storage.

        (1) Only done in the event of an evacuation of the employee and/or dependents. JTR C11007-A.

        (2) Authorized only when the POV "was transported, or authorized to have been transported, at Government expense to the PDS" or the POV was driven to the PDS where "POV use was determined to be 'in the Government's interest.'" JTR C11007-A.

    b. Where Stored. Although written backwards, the JTR allows POVs to be stored anywhere from the PDS where the evacuation took place to the place where the employee was evacuated to. JTR C11007-B.

    c. Authorized Expenses. About the only item excluded from allowable expenses in relation to storage of the vehicle is insurance carried on the POV. JTR C11007-C.

    d. Subsequent Shipment. "A POV may be shipped at Government expense ... in connection with an employee's PCS to a new PDS or upon return of the employee serving under a transportation agreement to the actual residence following separation from the OCONUS PDS." JTR C12000-F.

11. Payments & Allowances.

    a. Affect of Evacuation on Overseas Allowances When: Family Ordered/Authorized to Depart – Employee Remains at Post.

        (1) Post Allowance. After all members of an employee's family depart, the post allowance is reduced to the "employee without family" rate. DSSR § 621.1(a).

(2) Living Quarters Allowance (LQA). LQA may continue at the "with family" rate for a period NTE six months. DSSR § 621.1(c) .

(3) Temporary Quarters Subsistence Allowance (TQSA). If the sponsor is on TQSA when the evacuation occurs, if early return of the employee's family to the post is anticipated, TQSA may continue at the rate prescribed in DSSR §§ 120 and 925. DSSR § 621.1(b).

(4) Education Allowances for Dependents. See discussion at DSSR § 621.1(d).

b. Affect on Overseas Allowances When: Employee & Family Ordered/Authorized to Depart.

(1) Post Allowance. Terminates as of the close of business of the departure day from the post. DSSR § 621.2(a).

(2) Living Quarters Allowance (LQA). Terminates as of the close of business of the departure day of the employee from the post, unless the employee is required to maintain and pay for quarters at the post or unless lease termination is impossible or impracticable. DSSR § 621.2(c).

(3) Post Differential and Danger Pay. Both payments terminate in accordance with DSSR §§ 532, 654.2, respectively. Subsequent eligibility for these benefits to an evacuated employee at the safe haven or other temporary duty stations is governed by DSSR §§ 540, 655, respectively. DSSR § 621.2(f).

(4) Temporary Quarters Subsistence Allowance (TQSA). If the employee is on TQSA, the allowance is terminated as of the close of business of the departure day from the post. DSSR § 621.2(b).

(5) Education Allowances for Dependents. See discussion at DSSR § 621.2(d).

c. TQSA & TQSE PCS Allowances Not Allowed. TQSE is not authorized for an evacuation. JTR C12000-G. Neither is TQSA authorized. TQSA is for temporary quarters and expenses "immediately preceding final departure from that PDS if the employee is eligible for a Living Quarters Allowance (LQA)." JTR C1003.

d. Pay & Allowances During Evacuation. There are two general

authorities for payments and allowances for civil service employees and their families during evacuations:

- 5 U.S.C. §5522 provides authority for advance pay, allowances, and differentials when an employee and/or dependents are authorized or ordered to evacuate the employee's PDS; and,

- DoD Instruction 1400.11, adopted the governing provisions of the DSSR chapter 600, " Payments During an Ordered/Authorized Departure," *reprinted in* DoD Instruction 1400.11, Appendix I, Part A (annotated and modified to relate to DoD employees).

e. Who Is and Isn't Authorized Evacuation Payments & Allowances.

(1) The provision on payments and allowances applies to DOD civilian employees and third-country nationals (i.e., individuals who are not nationals of the country where the evacuated post is located), DSSR § 612.1.(1).

(2) The evacuation payments and allowances provisions do not apply to the following:

(a) Locally hired American citizens who work for the U.S. Government but who do not have a Transportation Agreement. DSSR § 612.3.(2).

(b) Local United States citizens who do not have official U.S. Government employment, including but not limited to, Americans with private business or organizations, teachers recruited by local American-supported schools, ... and individuals with contracts to work for the host government. DSSR § 612.3.(1).

(c) Dependents of uniformed personnel; they are covered by Joint Federal Travel Regulations, Volume 1, (JFTR), Chapter 6, Part A. DSSR § 613b.

(d) Uniformed members are not evacuated; they are sent TDY as required. DSSR § 613b.

(e) Employees/dependents who have not yet arrived at the PDS at the time of the evacuation/departure order do not get evacuation allowances. DSSR § 639. But, the employees/dependents who have not yet arrived may be eligible for payments equivalent to those evacuated in

chapter 600 "Payments During Evacuation/Authorized Departure" under limited circumstances. DSSR § 639, *referencing* § 245.

(f) DSSR § 245 provides that unless otherwise directed by the "head of agency," employees or family members unable to proceed to a post due to evacuation of the post, qualify for benefits equivalent to those being evacuated provided the following criteria have been met:

(i) transfer orders have been issued, and

(ii) one of the following applies:

(I) HHG have been packed out and residence quarters vacated; or

(II) the employee transferring from a U.S. post has an irrevocable contractual agreement for lease or sale of residence; or

(III) employee transferring from a foreign post with direct transfer orders (i.e., no home leave or equivalent prior to reporting to the new foreign post) is required to vacate residence quarters; and

(iii) "on the date of the ordered/authorized departure order the employee is within 60 days of scheduled departure directly to the new post of assignment.

DSSR § 245.

(g) Transitional SMA. Finally, if the criteria for payments under neither chapter 600 nor section 245 are met, then dependents who normally would accompany an employee to post are eligible for involuntary separate maintenance allowance under DSSR § 260. DSSR § 639 chapter 600 Evacuation FAQS no. 20.

f. The entitlement to advance pay and allowances ends:

- when the employee is determined as covered by the Missing Persons Act (50 App U.S.C. §1001 et seq.),

- unless payment is earlier terminated under these regulations,

- or, unless determined otherwise by the Secretary of State.

DSSR § 613.

12. Advance Pay. An employee may be paid in advance of the normal pay day to help defray the immediate expenses incident to an evacuation of an employee and/or dependents. DSSR § 616. The advance is for a maximum of 30 days "salary" based on the compensation rate including any allowances or post differential to which the employee was entitled immediately prior to the ordered/authorized evacuation. DSSR chapter 600 Evacuation FAQS no. 18.

    a. Any advance payment includes any allowances or post differential for which an employee was eligible immediately prior to the evacuation order/authorization issuance. DSSR § 617.

    b. The advance payment includes pay to be received, DSSR § 617.1, during a period of ordered evacuation or authorized departure, DSSR § 610.i, and presumably includes pay for salary earned but not yet paid.

    c. The advance payment is made at any time after the evacuation order/authorization is given, but not later than 30 days after the employee/dependent(s) has evacuated from the PDS. DSSR § 617.2.b.

    d. Repayment of Advance Pay. Repayment (offsets against salary and allowance payments, DSSR § 620) is not required as long as the evacuation order/authorization remains in effect. DSSR § 622.d, *referencing* §§ 618 and 638 (reconciling employee accounts). Repayment of the indebtedness is made either in full or in partial payments as agreed upon by the payroll officer and the employee. DSSR § 618.1. Recovery of indebtedness for an advance payment may not be required if the head of agency determines that recovery is against equity and good conscience or against the public interest IAW agency procedures. DSSR § 618.2.

13. Evacuation Allowances - General Rules. DSSR § 630.

    a. The employee is responsible for normal family living expenses.

    b. Only one departure from the PDS is permitted an evacuee during any one evacuation period.

c. In determining the direct added expenses payable as special allowances under these regulations, an agency should consider the applicable allowances as the maximum amounts payable.

14. Evacuation Allowances - Evacuation Travel Expenses.

a. Travel expenses are IAW the JTR for TDY travel. DSSR § 631, *citing* JTR C3150.

(1) Per diem is authorized for dependents at a rate equal to the rate payable to the employee, except that the rate for dependents under 12 years old is one-half of this rate. DSSR § 631.

(2) Per diem is payable from the date of departure from the evacuated area through the date of arrival at the safe haven, including any delay period en route that is beyond an evacuee's control or that may result from evacuation travel arrangements. DSSR § 631.

b. When CONUS is the Safe Haven, travel is authorized to the employees home leave point or any other CONUS location. DSSR § 631a.(1).

c. Dependents who departed earlier than the employee and the employee has been ordered to a different CONUS safe haven, the agency will pay for dependent travel to join the employee. DSSR § 631a.(1); DSSR chapter 600 Evacuation FAQS no. 5.

d. Dependent travel and transportation expenses to and from an alternate OCONUS safe haven are reimbursed NTE a constructed cost calculation from the evacuated post to the employee's CONUS safe haven. DSSR § 631a.(1).

e. When an evacuee is away from a post on official travel the agency will pay travel expenses for the employee to reach safe haven from his her location and from the dependent's location. DSSR § 631a(2).

f. When an employee/dependent is away from the PDS on personal travel, travel expenses to the safe haven location are constructed cost, NTE the cost of travel and transportation from the evacuated post to the safe haven location.

15. Evacuation Allowances - Unaccompanied Baggage, the “Airfreight Allowance” & “Airfreight Replacement Allowance.” An airfreight

allowance for unaccompanied baggage is authorized for authorized/ordered departure from/return to post. DSSR § 631a(3), *citing* JTR C8020).

a. Airfreight Replacement Allowance. If the airfreight allowance is not used because of circumstances beyond the evacuee's control this replacement allowance may be granted to help defray costs of items, normally part of the authorized airfreight shipment, which must be purchased. The flat amounts are as follow:

- First evacuee without family: $250;
- First evacuee with one family member: $450;
- First evacuee with two or more family members: $600.

Receipts are not required for this allowance. DSSR § 631a(3)

b. Even when the airfreight replacement allowance is granted from post, evacuees are still eligible for an airfreight allowance when/if they return to post. DSSR § 631a(3).

16. Evacuation Allowances - Transportation Allowance at Safe Haven. In the absence of a POV at the safe haven location, a transportation allowance is paid from the first day following arrival day at the safe haven location. Receipts are not required. The amounts payable are:

- for first evacuee without family, $10 per day;
- for first evacuee with one family member, $15 per day;
- for first evacuee with two or more family members, $20 per day.

DSSR § 631b.

17. Evacuation Allowances - Subsistence Expense Allowance (SEA). Unless otherwise directed by the Secretary of State, SEA is available. DSSR § 632.

a. Duration of SEA. The DSSR suggests that a new evacuation order would have to be issued each 180 days. "Payment commences as of the date following arrival day of the evacuee at an authorized safe haven ... and may continue NTE day 180 ... ." DSSR § 632. BUT, the same DSSR § also states, "any subsequent order issued after the 180th day constitutes a separate order, starts a separate 180-day

period, and applies only to evacuees departing under that order." Apparently, an agency could continue past the initial 180 days by issuing a new order for those evacuees/dependents who are still at the safe haven.

b. Termination of SEA. As long as the SEA payments have/will not exceed 180 days:

(1) Employees NOT returning to the foreign PDS, are allowed three days of SEA following termination of the evacuation order as long as the employee has not started PCS travel to another PDS (when travel per diem would be applicable). DSSR chapter 600 Evacuation FAQS no. 17.

(2) For employees/dependents returning to the evacuated PDS, an additional seven days SEA may be authorized due to transportation delays. An evacuee must provide a statement on the travel voucher justifying the additional days required to arrange for return transportation to the foreign PDS (e.g., airline reservations or air freight pick up). DSSR chapter 600 Evacuation FAQS no. 17.

(3) Personal reasons do not justify additional days of SEA. DSSR chapter 600 Evacuation FAQS no. 17.

c. SEA is paid from the day following arrival day at the safe haven location by the first evacuee. DSSR § 632.

d. Reimbursement is made according to either a commercial lodging or non-commercial (e.g. government provided quarters) lodging rate. DSSR § 632.1 (a). The commercial rate requires a lodging receipt.

e. SEA is divided into two periods, day 1-30 and the 31st through 180th day. DSSR 632.1 (a).

f. The employee may choose to be the "first evacuee" if evacuated, even if evacuated after the dependent(s). There is only one "first evacuee", except as provided under DSSR § 632.4(b) ("Tandem Couples"). DSSR 632.1(a).

g. SEA (Lodging) Commercial Rate.

(1) Days 1-30 following arrival day at the safe haven location, DSSR 632.1(b)(1) :

For the first evacuee, up to 100 percent of the lodging portion of the safe haven locality per diem rate (receipt required) (any tax on lodging is separately reimbursed), plus a flat amount (no receipts required) equal to 100 percent of the M&IE portion of the safe haven locality per diem rate.

(2) With up to 150 percent of the lodging rate for special family compositions (non-spouse dependents age 18 or older or age 12 or over of the opposite gender).

(3) For each additional evacuee age 18 or older, a flat amount equal to 100 percent of the M&IE, and a flat amount equal to 50 percent of the M&IE for each additional evacuee under age 18.

(4) Amounts allowed from the 31st day through the end of the evacuation are, DSSR 632.1(b)(2):

- For the first evacuee the lodging remains the same but M&IE drops to a flat amount (no receipts required) equal to 80 percent;

- For each additional evacuee age 18 or older a flat amount equal to 80 percent of the M&IE, and 40% of M&IE for each additional evacuee under age 18.

(5) Where the employee signs a lease for lodging at the safe haven and is then ordered to return to post, the employee can get a waiver of the refund due the government on any overpayments of allowances, for up to 30 days of the unexpired portion of the lease not to exceed per diem rates. DSSR 632.1(b)(3) *referencing* § 632.4(c).

h. SEA Non - Commercial (Lodging) Rate.

(1) Days 1 - 30 from the day following arrival day at the safe haven location, DSSR 632.1(c) (1), are:

- For the first evacuee, a flat amount of 10 percent of the lodging portion of the safe haven per diem rate (no receipts required) plus a flat amount of 100 percent of the M&IE;

- For each additional evacuee age 18 or older a flat 100 percent of the M&IE, and 50% M&IE for each additional evacuee under age 18.

(2) The per day amounts allowed from the 31st day through the end of the evacuation are: for the first evacuee, no lodging reimbursement is provided and a flat amount (no receipts required) of 80 percent M&IE is paid. For each additional evacuee age 18 or older a flat amount equal to 80 percent of the M&IE, and 40% M&IE for each additional evacuee under age 18. DSSR 632.1(c)(2).

i. Suspension of SEA. SEA payments are suspended in the applicable per-person amount when the employee or dependents are authorized the travel expense allowance under DSSR section 631, travel per diem, or educational travel under DSSR section 280. If SEA payments are temporarily suspended for the first evacuee, another dependent also receiving SEA becomes the first evacuee and receives the higher SEA payment. DSSR § 634.

18. Evacuation Allowances - Access to Household Goods (HHG) in Storage. Access to HHG in storage (e.g., in CONUS), or delivery and return to storage, is NOT covered and is at evacuee's personal expense. DSSR § 631b.

19. Evacuation Allowances - Special Education Allowance.

a. When the Official Safe Haven is in a foreign area, and the school is at the safe haven, then the school allowance would be the "school at post" rate for the safe haven. DSSR § 633.1(a).

b. When the children are sent away from the foreign area safe haven to schools necessitating boarding, the school allowance rate is the "school away from post" rate of either the PDS or safe haven, at the discretion of the authorizing officer. DSSR § 633.1(b).

(1) Note, that the SEA ceases for the child who is sent to the boarding school. DSSR § 633.1(b).

c. When the Safe Haven is in the United States, the DSSR states, "Ordinarily, education allowances are not payable on behalf of children evacuated from a foreign PDS to a safe haven in one of the fifty United States or the District of Columbia if accompanied by a parent, **as public schools are available to all residents**." DSSR § 633.2 (emphasis added). The DSSR does not address what, if any educational allowance, is available for those evacuees who are not legal residents of the safe haven school district.

d. When the child was already attending a school in the United States

and the overseas family was receiving the "away from post" the rate authorized for the PDS may continue for the remainder of the school year. DSSR § 633.2.

20. Termination of Evacuation Allowances. The authority for allowance payments under DSSR § 620 ceases as of the earliest of the following dates:

    a. the date the employee commences travel under an assignment order to another PDS outside the evacuation area;

    b. the effective date of transfer when the employee is already at the post to which transferred for permanent duty;

    c. the date of separation from the agency;

    d. the date specified by the head of agency;

    e. the date specified by the Secretary of State;

    f. 180 days after the evacuation order is issued; or

    g. the date the evacuee commences return travel to the previously evacuated post.

    DSSR § 623.

E. Family Visitation Travel (FVT). 10 U.S.C. 1599b; 22 U.S.C. 4081; JTR C6650.

1. Purpose. The purpose of FVT is to allow an employee to travel at government expense to visit immediate family members who were evacuated from the employee's foreign PDS. FVT is a discretionary allowance paid for by the employee's command. It is not authorized for travel within the foreign country of assignment. JTR C6650-A. FVT must be scheduled so as to ensure the orderly performance of official duties and should, to the maximum extent possible, be combined with travel required for official purposes. JTR C6650-J.1 - .J.2.

2. Allowable Expenses. Basically, round-trip the air fare and taxes between the airport serving the employee's foreign PDS and the destination airport. It also covers ground transportation between intermediate airports, but not the cost of getting to the origin or destination airports. Per diem and excess baggage are not authorized. JTR C6650-C.

3. Eligibility.

   a. Basic Eligibility. EVT only applies to (JTR C6650-D):

      (1) U.S. citizen employees;

      (2) Assigned to an FOCONUS PDS;

      (3) For a tour of more than one year;

      (4) Whose immediate family members were evacuated from the employee's FOCONUS PDS.

   b. Where the Family Has Relocated to CONUS or a NFOCONUS Area (JTR C6650-K):

      (1) No more than two round trips may be authorized in a year, JTR C6650-K.1, with the total cost of the FVT limited to the cost of two coach class round trips to the family's residence. JTR C6650-K.3.

      (2) FVT is allowed beginning 3 months after the family members are evacuated. JTR C6650-K.3.

      (3) FVT is not permitted within 3 months prior to a scheduled transfer, departure on RAT, or voluntary separation. JTR C6650-K.4.

      (4) There must be an interval of 3 months between trips. JTR C6650-K.5.

      (5) An employee's absence from the PDS may not exceed 48 calendar days in a year and should not ordinarily exceed 24 calendar days for any individual trip. JTR C6650-K.5 - K.6.

   c. Where the Family Has Relocated to a FOCONUS Location.

      (1) More than two trips are authorized but the total cost of FVT must not exceed the cost of two round trip coach class tickets. JTR C6650-L.1.

      (2) FVT is allowed beginning 4 weeks after the family members are evacuated to a FOCONUS location. JTR C6650-L.2.

(3) FVT to a FOCONUS location is not permitted within 4 weeks prior to a scheduled transfer, departure on RAT, or voluntary separation. JTR C6650-L.3.

(4) There must be an interval of 4 weeks between trips. JTR C6650-L.4.

(5) An employee's absence from the PDS may not exceed 48 calendar days in a year exclusive of time spent on duty or in an official travel status. JTR C6650-L.5.

(6) Exceptions for valid reasons may be sought. JTR C6650-L.7.

F. Death of an Employee or Dependent Overseas or In Transit.

1. Transportation of Remains In Case of Death - Statutory Limit. The statutory discussion begins with a general prohibition that an agency "may not authorize an expenditure in connection with the transportation of remains of a deceased employee" except as specifically authorized by statute. 5 U.S.C. 5741.

2. Death of the Employee. If death occurs while the employee was in a travel status away from his "official station in the United States" or "while performing duties outside the continental United States or in transit thereto or there from" then the agency may pay the expense of preparing and transporting the remains to the home or official station of the employee or such other place appropriate for internment as is determined by the agency. 5 U.S.C. 5742(b)(1).

   a. The agency can also pay the expense of transporting and moving the deceased employee's dependents to the employee's former home or such other place as is determined by the head of the agency concerned, "if death occurred while the employee was performing official duties outside the continental United States or in transit thereto or there from ... ." 5 U.S.C. 5742(b)(2).

   b. Escorts. Where the employee dies while performing official duties outside the continental United States, or in transit, the agency may pay the expenses of two persons to escort the remains. 5 U.S.C. 5742(b)(3).

3. Continuation of Housing Allowance Following Death of Employee. Where a quarters allowance would be paid except for the death of an employee, such allowance may be continued to allow any child of the

employee to complete the current school year at the post or away from the post. 5 U.S.C. 5922(d).

4. Return of Dependents Following Death of an Employee. When an employee dies at post in a foreign area, a transfer allowance under 5924(2)(B) may be paid to the surviving spouse and dependents, when the spouse or dependent was residing at the employee's post of assignment or at another place outside the United States for which a separate maintenance allowance was being furnished under section 5924. 5 U.S.C. 5922(f).

5. Death of a Dependent. Where an employee is performing official duties outside the continental United States or the dependent was in transit, and a dependent who was residing with the employee dies, the agency may:

   - Pay the necessary expenses of transporting the remains to the home of the dependent or such other place as is appropriate for internment as is determined by the head of the agency. 5 U.S.C. 5742(c).

   - Furnish mortuary services and supplies on a reimbursable basis either when local commercial mortuary facilities and supplies are not available or the cost of such are prohibitive as determined by the head of the agency. 5 U.S.C. 5742(c)(1) and (2).

   a. Reimbursement "shall be collected and credited to current appropriations available for the payment of these costs." 5 U.S.C. 5742(c).

G. Emergency Visitation Travel (EVT). 10 U.S.C. 1599b (general authority); 22 U.S.C. 4081 (foreign service travel authorized); JTR Vol 2, Chapt. 6 Part O. Overseas commanders have long had the authority to allow military members and their family to return to the United States in the event of death or serious medical emergency by close relatives in the States. Options for civilian employees in similar circumstances have been more limited until recently.

1. Old Rule. Claims for bereavement travel were denied. "Civilian employees can be reimbursed for travel expenses if they travel 'on official business.' 5 U.S.C. 5702(a) (2000); JTR C1050-B.1.a, C3300-D. Civilian employees cannot be reimbursed, however, for the expenses of personal travel. The trip Ms. Reaves made [from Korea so she and her husband could attend the funeral of a family member in the United States] was personal and was not made in connection with the performance of

her official duties." *In the Matter of Lana J. Reaves*, GSBCA 16237-TRAV (January 21, 2004).

2. Old Solution. The best that could be done for civilian families was to allow them free travel on "rotator" flights back to the U.S. coast and to then take commercial travel from there paid for by the employee.

3. New Rule. In reaction to the *Reaves* case the Per Diem, Travel and Transportation Allowance Committee revised the JTR. This provision became effective September 17, 2004, authorizing EVT for eligible employees and/or family member(s).

4. The purpose of EVT is to allow an eligible employee and/or eligible family members assigned to a F-OCONUS PDS to travel at government expense in certain situations of family emergencies. JTR C6675-A.

5. Authorized Circumstances. Travel from the F-OCONUS PDS on EVT is authorized in circumstances involving:

   a. A serious illness or injury of an immediate family member JTR C6675.1, C6675-A.1;

   b. Death of an immediate family member JTR C6675.2, C6675-A.2 f;

   c. Other "Special Family Circumstances." "EVT is authorized ... when an eligible employee or family member:

      (1) Travels to attend funeral services of a deceased person who has stood in the place of a parent, or to visit a seriously ill or injured person who stands in the place of a parent; or

      (2) Is the sole surviving member of the family of a seriously ill, injured, or deceased person."

      JTR C6679, C6675.3, C6675-A.3.

   d. To accompany the remains of "an immediate family member who (a) ordinarily resides with the employee, (b) is included in the employee's residence and dependency report, and (c) who dies in a foreign country" to "a place of interment anywhere in the world." JTR C6676-A.2.

      (1) Where the place of internment is located outside the United States ("outside both the CONUS and all non-foreign OCONUS areas") the reimbursement for transportation costs is limited to

"the place where the visitation travel begins and the employee's actual residence" i.e., home of record. JTR C6676-C.

e. EVT contemplates the return of the employee to work at the employee's PDS. *See* JTR C6675-F (Refund).

f. "Serious illness or injury" is defined as an "injury or illness from which, based on competent medical opinion, death is imminent or likely to occur, or an illness or injury during which the absence of the employee and/or eligible family member(s) would result in great personal hardship." JTR C6675-G.4.

g. "Immediate family member,"

(1) That is, the persons an employee or eligible family member could fly back to visit "means the following relatives of" the employee:

(a) Spouse, and parents thereof;

(b) Children, including adopted children and spouses thereof;

(c) Parents;

(d) Brothers and sisters, and spouses thereof; and

(e) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

JTR C6675-G.3.

(2) Note that the "immediate family" is the eligible employee's immediate family and except for the spouse's parents, not the family of the employee's spouse.

(3) Note that the "immediate family" does not specifically include grandparents, although they may meet the definition of subparagraph e.

6. "EVT is authorized. It is not a discretionary allowance." JTR C6675-A. In cases of serious illness or injury, the authorizing official "must authorize/approve requests for EVT at Government expense that meet the requirements of this Part." JTR C6677-B. "EVT expenses are the responsibility of the eligible employee's command." JTR C6675.

7. Authorization/Eligibility is limited to a combination of employee eligibility and authorized departure and destination points.

   a. Individuals Authorized to Travel.

      (1) An "eligible employee" is an employee who is a US citizen assigned to a F-OCONUS PDS, with a TA which provides for return travel to the employee's actual residence. JTR C6675-G.1.

      (2) An "eligible family member" is the eligible employee's "spouse, or children ... who are part of the employee's household." JTR C6675-G.2.

         (a) This definition excludes other individuals who are dependents of the eligible employee. It's not certain if that distinction is deliberate or not.

         (b) It is also unclear whether EVT covers the transportation of a child who is authorized to attend school at a different F-OCONUS location is considered "part of the employee's household."

   b. Authorized Departure Points. EVT is designed to get the employee and dependents at the F-OCONUS PDS to an authorized destination.

      (1) Employees away from the PDS on leave or TDY in CONUS or non-foreign CONUS are NOT eligible for EVT. JTR C6675-A.

      (2) But, another provision of the JTR relates that EVT is available to an eligible person at another foreign country location. "EVT by an employee and/or by an eligible family member, who is either at the PDS **or away from the PDS at another foreign country location**, is authorized ... ." JTR C6676-A.1 (emphasis added).

      (3) And, where the immediate family member is seriously ill or injured, or where there are remains to be accompanied, and the afflicted family member or remains of are outside CONUS or any NF-OCONUS areas, then the reimbursement of transportation costs is limited to travel from "the place where visitation travel begins," the instruction does not specify from the employee's PDS. JTR C6676-C.

      (4) Also, it is not clear if EVT is allowed for an otherwise eligible child who is authorized education at a different F-OCONUS location to travel from the school.

c. Authorized Destinations For EVT Travel.

(1) EVT is authorized to CONUS, NF-OCONUS, or "other location in certain situations." JTR C6675-A.

(2) "EVT expenses are NOT permitted for travel within the foreign area/country of assignment." JTR C6675-A (emphasis added).

8. EVT is probably limited to one person, the employee or an eligible family member, but the instruction is a little unclear and EVT may be available to an employee and an eligible family member(s).

a. The introductory paragraph relates that, "The purpose of Emergency Visitation Travel (EVT) is to allow an eligible employee **and**/or eligible family member(s) to travel at Government expense ... in certain situations of family emergency." JTR C6675-A (emphasis added, all parentheticals original, references omitted).

b. But, another paragraph would seem limit the travel to one person, "General. Emergency visitation travel is authorized to **an** eligible employee or **an** eligible family member(s) to travel ... ." JTR C6676-A (emphasis added). But its next subparagraph would seem to allow more than EVT. "EVT by an employee **and**/or by an eligible family member ... ." JTR C6676-A.1 (emphasis added).

c. With respect to accompanying remains, the instruction is clear that EVT will be funded only for one person, "EVT is authorized/approved to enable an employee or eligible family member (one or the other) to accompany to a place of internment ... ." JTR C6676-A.2 (parenthetical original).

d. The next subparagraph suggests that EVT is only one person, but the reference is to the "member of a family" which may refer to the eligible employee and family member being the "family" or may be limiting the travel to the eligible employee and only one family member. "Ordinarily, only one member of a family may travel at Government expense on EVT. However, in exceptional circumstances, such as critical injury to a dependent child ... attending school away from PDS that requires the presence of the employee and/or eligible family member(s), or the death of a dependent at the PDS which for compassionate reasons requires the employee and eligible family member(s) to accompany the remains to interment, EVT for more than one family member may be authorized/approved." JTR C6676-A.3.

e. The last subparagraph in the section (by allowing both parents to travel when both parents are eligible for EVT travel and a dependent child is involved) suggests that ordinarily, only one person can travel on EVT. JTR C6676-A.4.

9. Number of EVTs Allowed.

a. For Serious Injury or Illness, one round trip for each serious illness or injury to visit each afflicted immediate family member or person who stood in the place of a parent or when an eligible employee or family member is the sole surviving member of a family. JTR C6677-A, C6679.1, C6679.2.

b. EVT is authorized for the death of an immediate family member or person who stood in the place of a parent or when an eligible employee or family member is the sole surviving member of a family. JTR C6678-B.

10. Allowable Transportation Expenses. This provision, JTR C 6675-C, is written in terms of travel by plane from the F-OCONUS PDS (as that would be the most common circumstance), but other modes of commercial transportation, ship, rail or bus service, are also authorized. JTR C6675-D.1 & .3.

a. Transportation costs are limited to the cost of travel from the airport serving the F-OCONUS PDS to the airport at the authorized destination and return. JTR C6675-C.

b. Authorized travel costs include air fare, airport taxes and transportation between intermediate airports en route. JTR C6675-C.1. Reimbursement must not exceed allowable transportation expenses actually incurred. JTR C6675-D.6.

c. The following costs are specifically excluded: travel to the departure airport or from the destination airport, JTR C6675-C. Note 1; and, per diem, and excess or unaccompanied baggage charges. JTR C6675-C. Note 2.

d. Travel will be by the most expeditious mode on direct routing. Indirect routing is authorized only when official duties must be performed en route, or it is to the government's advantage to purchase a ticket in a foreign currency at an intermediate point. JTR C6675-D.1 & 2.

11. Obtaining Authorization for EVT Travel & Payment Issues.

a. Authorization After-the-Fact. In cases of serious injury or illness, if the employee or eligible dependent travels at personal expense before EVT is authorized, reimbursement may be made after the fact. JTR C6677-C, E.

(1) By reference, this provision also applies where the employee or eligible family member travels visit or attend the funeral of a person who has stood in the place of a parent or where the employee or eligible family member is the sole surviving family member. JTR C6679, *referencing* JTR C6677.

(2) Where an eligible employee or family member has traveled at their own expense to visit an ill or injured immediate family member, and the immediate family member either dies during the visit or within 45 days after the eligible employee or family member left the PDS to make the visit, the eligible employee or family member may elect either reimbursement for the trip already undertaken or a subsequent EVT for the internment of the deceased. Reimbursement is limited to cost of transportation that would have been procured through a government travel office and is not available for transportation under a foreign flag air carrier unless a U.S. flag carrier was not available under JTR C2204-C. JTR C6678.

b. Information to Be Provided. In cases of serious injury or illness, it is the authorizing official's responsibility to "promptly cause appropriate inquiries to be made to determine the seriousness of an illness." JTR C6677-C.

c. Payment Issues: Refund - the employee must repay the government for EVT expenses used as a substitute for travel for which EVT use is not authorized. JTR C6675-E.

XXIV. WHICH ACTIVITY FUNDS THE PCS & ALLOWANCES?

A. General Rule for Funding PCS Costs - Gaining Activity Pays. When an employee transfers from one agency to another, the gaining agency pays the authorized expenses. 5 U.S.C. 5724(e). A similar rule is followed for moves within DOD. The gaining activity generally funds the PCS costs whether the employee comes from a different department or agency or a different DOD component or within the same DOD component. And, it is the gaining activity which decides whether to grant the discretionary allowances. JTR

C1052-B.1 (different departments, agencies or DOD components), C1052-C.1 (within the same DOD component).

1. Exception for RIFs & Transfers of Function - Losing Activity Funds. 5 U.S.C. 5724(e). For further discussion of the effect of RIFs and TOFs on funding moves, see discussion beginning at page 255.

B. General Rule for Funding OCONUS Moves - OCONUS Activity Pays. The general rule is the same when the employee transfers to the OCONUS activity, the gaining OCONUS activity applies. BUT on return, the OCONUS activity funds the PCS back to the employee's actual residence (generally the PDS where the employee departed for the overseas assignment) or some other selected point (like the new PDS) in the Untied States but not to exceed the constructive cost of the move to the actual residence. 46 Comp. Gen. 628 (January 24, 1967). Beyond the "actual residence" point, the gaining activity may fund the balance of the move to the gaining PDS. JTR C1052-C.4.

1. Funding Move To OCONUS PDS. There is no separate rule, it's the same as the general rule, the OCONUS PDS, as the gaining activity, funds the move. JTR C1052-B.1 (move between different departments/agencies), C1052-C.1 (move within the same DOD component).

2. Funding Move From the OCONUS PDS. The losing OCONUS PDS pays for the move (transport of employee and dependents, per diem, and transport of HHG/POV) up to the cost of moving to the employee's actual residence (home of record) in the States.

   - If the move is within the same DOD component, and the gaining activity authorized PCS allowances, the gaining activity pays the balance of the costs for the move, the miscellaneous expense allowance, TQSE, and if the employee is otherwise eligible, the real estate allowance. JTR C1052-C.4.

   - If the move is to a different DOD component, that organization may authorize the remaining PCS costs under the JTR the same as it would decide to fund PCS costs in filling any other position (see JTR C5005). JTR C1052-B.1.

   - If the move is outside of DOD to another federal agency, the gaining agency would have to decide what assistance it would provide the employee under its own regulations. JTR 1052-B.1.

C. JTR Organization of Discussion. JTR C1052 generally divides the discussion of funding PCS moves into:

- Moves within the Same DOD Component, JTR C1052-C.
- Moves between different Departments and Agencies or Different DOD Components, JTR C1052-B.
- Employees who find jobs while on RAT, JTR C1052-D, and
- Separation from OCONUS Employment. JTR C1052-E.

D. Specific Rule - Funding PCS Moves From OCONUS Within the Same DOD Component.

1. Requirements For Employee to Qualify for PCS Funding. In order to qualify for funding of the move from OCONUS, the employee must meet one of the following:

   a. Employee who completes the prescribed tour of duty under the current agreement, JTR C1052-C.4.a;

   b. Employee released from the period of service specified in the agreement for reasons beyond the employee's control that are acceptable to the losing DoD component, JTR C1052-C.4.b;

   c. Employee with/without transportation agreements moved under the PPP, JTR C1052-C.4.d; and,

   d. There is a special rule for Army employees moved under the Civilian Career Management Program with an initial OCONUS tour of duty. JTR C1052-C.4.c.

2. The Rule - The Losing OCONUS Activity Pays. "When an employee transfers from an OCONUS activity to a CONUS activity, the losing OCONUS activity must pay for the costs of transportation for the employee and dependents, including per diem and transportation of the employee's HHG/POV to the employee's actual residence or to the CONUS activity up to the cost for such transportation to the employee's actual residence. If the gaining activity authorizes PCS allowances, it is responsible for the cost of necessary additional transportation for the employee and dependents, including per diem and transportation of the employee's HHG/POV to the new PDS, the miscellaneous expense

allowance, real estate allowances (if the employee is eligible), and at its discretion for a house hunting trip (if the employee is eligible) and TQSE ... ." JTR C1052-C.4.

a. The Hawai'i Clarification. The rule is the same where the employee is being transferred from an OCONUS position to an activity within the same DOD component in Hawai'i - the losing OCONUS funds the move. JTR C1052-C.5. It is not clear why the standard rule was explicitly stated for Hawai'i or why it's not repeated for other non-foreign OCONUS areas.

b. Failed Probationary Employees. The rule is the same for employees who fail to complete their probationary period - the losing activity pays. JTR C1052-C.6.

c. Moves Involving RIFs, TOF, BRAC. The rule is the same as in OCONUS situations, the losing activity pays. JTR C1052-C.2 & C1052-C.3. For further discussion of the effect of RIFs and TOFs on funding moves, see discussion at page 255.

Statutory Distinction: By statute (unless a RIF or TOF is involved), when an employee transfers from any PDS (CONUS or OCONUS) going from one agency to another, the gaining agency pays from PDS to PDS. 5 U.S.C. 5724(e). By JTR regulation, when an employee transfers within the same DOD component, the OCONUS losing activity pays for the move from the OCONUS PDS to the actual residence or equivalent and if the gaining activity authorizes PCS allowances, the gaining activity is responsible for the additional costs from the actual residence to the new PDS. JTR C1052-C.4. The difference is that the statute only covers transfers between agencies while the JTR rule is restricted to transfers within a DOD component.

E. Specific Rule - Funding PCS Moves To Another Department or Agency or To Another DOD Component.

1. The Rule - The Gaining Activity Pays. Moves from OCONUS positions are not specifically addressed and so, unless there is an exception, the normal rule would apply - "necessary costs associated with a PCS may be paid by the gaining department/agency/COD Component." JTR C1052-B.1, *referencing* JTR C5005 (generally discussing activity options for filling a position with PCS costs).

2. Exceptions. In the following exceptions, the losing activity pays for the PCS move - there is no distinction for OCONUS activities.

   a. When an employee is identified for separation/demotion caused by a RIF/transfer of function. JTR 1052-B.2. The JTR relates when the employee is being hired by a non-DOD activity, that the losing DOD activity should try to get the non-DOD gaining activity to fund the move, but if the gaining activity refuses, then the losing activity should pay. Note: under these circumstances the losing activity pays for the entire cost of the move - unlike OCONUS moves within a department where the overseas activity only funds the move up to the cost of moving the employee back to the home of record.

   b. When an employee is reassigned under the PPP (and no RIF or TOF is involved) to a different component, according to JTR 1052-B.3, necessary movement costs are funded by the losing activity in accordance with C1052-E.3. For separation from OCONUS employment the JTR provides that:

      - when the employee is under a transportation agreement and returns to the employee's actual residence or an allowable alternate destination in the U.S. for separation, and

      - after arrival at the destination is employed by another DoD component without a break in service, the losing OCONUS activity must pay for the allowable separation travel/transportation costs not in excess of that to the actual residence.

      - For the conditions and limitations regarding payment by the gaining DoD component when additional travel/transportation to the new PDS is necessary and circumstances under which PCS allowances may be authorized and paid, JTR C1052-E.3, *referencing see* C5085-F [separation travel from OCONUS duty]; 46 Comp. Gen. 628 (1967); 47 Comp. Gen. 763 (1968); B-163113, 27 June 1968; B-163364, 27 June 1968). (Note, these cases are discussed in Section H, below "!960 Era Rules.")

F. Specific Rule - Employee Obtains a Position While on Renewal Agreement Travel. In this circumstance, the employee has served all (or nearly all) of the period for the overseas assignment, has requested an extension of the overseas assignment, which the activity has granted, and while on RAT travel in the States, is selected for a position in the United States. JTR C1052-D.3.

1. The employee is authorized reimbursement for travel/transportation expenses to the new PDS instead of the actual residence indicated in the OCONUS TA. JTR C1052-D.3.

2. The losing OCONUS activity must pay the necessary travel/transportation costs to the new PDS up to the cost of such transportation to the actual residence. JTR C1052-D.3.

   a. Caveat: If the Government incurs additional expenses because of RAT performed by the employee/dependents to the actual residence, those expenses must be recovered from the employee. JTR C1052-D.3. In other words, the government will only pay for the family to return to the States one time. In this circumstance: the employee has taken RAT travel back to the States and found a job there; the OCONUS activity will fund the move; but if the cost of the RAT travel and the move are more than what the move would cost alone, then the employee pays the difference.

3. Necessary additional travel/transportation costs to the new PDSs may be paid by the gaining activity. JTR C1052-D.3.

   a. Caveat: If the gaining activity does not authorize a PCS move, the losing activity must amend the travel authorization to provide for the employee's return from the losing activity to the actual residence for separation. JTR C1052-D.3. The travel/transportation expenses are then funded as provided in par. C1052-E (separation from OCONUS employment).

G. <u>Specific Rule - Employee Separation from OCONUS Employment</u>. JTR C1052-E. In this case, separation means the employee is resigning or otherwise terminating employment with the OCONUS agency. It includes situations where the employee will be rehired the day following the employee's separation by a CONUS activity.

1. <u>Separation After Travel Begins</u>. Where the separating employee is eligible for transportation under a transportation agreement, the losing activity must pay the necessary en route travel/transportation cost for an employee who returns to the actual residence or an alternate destination up to the travel/transportation cost to the actual residence, for separation from the losing OCONUS PDS. JTR C1052-E.1.

2. <u>Separation Before Travel Begins</u>. When an employee eligible for travel/transportation to the actual residence resigns OCONUS before

beginning travel from the OCONUS PDS, the eligibility continues and the OCONUS losing activity must pay the movement expenses to the actual residence. JTR C1052-E.2.

a. This also applies when an employee under the same conditions expects to continue in Government service in a different department/agency in the geographical locality of the actual residence, provided the employee is not employed or authorized a PCS movement by the gaining activity before departure from the losing OCONUS PDS. JTR C1052-E.2, *citing* 44 Comp. Gen. 767 (1965).

3. Employment In Another DoD Component Without a Break In Service After Separation From the Losing Activity. JTR C1052-E.3. The rule is:

- When an employee under a transportation agreement returns to the actual residence (or an allowable alternate destination) in the U.S. for separation, and

- After arrival at the destination is employed by another DoD component without a break in service,

- The losing OCONUS activity must pay for the allowable separation travel/transportation costs not in excess of that to the actual residence. JTR C1052-E.3.

For the conditions and limitations regarding payment by the gaining DoD component when additional travel/transportation to the new PDS is necessary and circumstances under which PCS allowances may be authorized and paid. JTR C1052-E.3, *citing see paragraph* JTR C5085-F [separation travel from OCONUS duty], 46 Comp. Gen. 628 (1967); 47 Comp. Gen. 763 (1968); B- 163113 (27 June 1968); B-163364 (27 June 1968).

4. Responsibility for Separation Travel Costs When an Employee is Transferred Between OCONUS Activities. When an employee, under a transportation agreement at an OCONUS activity, is transferred to a different OCONUS activity at the same or a different PDS, the gaining activity is responsible for the employee's separation travel cost if the employee is or becomes eligible for separation travel and transportation allowances. JTR C1052-E.4.

5. TQSE Restriction. Employees assigned to an OCONUS PDS returning to their actual residence for separation are not entitled to TQSE at the destination. JTR 13115-C4. Whether this rule applies to return for

separation to an alternative location is unclear.

H. <u>1960 Era Rules - The Basis for the Current Rules</u>. The practice that developed in the 1960s treated the overseas assignment as a temporary interlude to a civil service career in the United States. Rather than establish a pattern where the overseas assignment was simply a move to another PDS, with moving costs to be funded according to the normal rule that the gaining command pays, instead the practice was based on the concept that the employee would depart from their "actual residence" in CONUS (almost always their current PDS) with the gaining overseas command funding the move, while their return from overseas was not to their follow-on CONUS PDS, but rather, a return for separation under the TA to their actual residence, paid not by the gaining CONUS command but the losing overseas command, which resulted in the employee resigning from the OCONUS position upon arrival in the States and then being picked up by the gaining command the next day to avoid a break in service, with the gaining command then responsible for funding the move from the actual residence to the new PDS; a consequence being that the family members did not get per diem while in transit. Got it?

Key Distinctions: Primary factor is not "break in service" versus "no break in service" but:

"Return for Separation" versus "transfer between activities, with or without a break in service,"

And

Is the move between agencies or within an agency?

1. <u>Existing Statutes 1960s Era</u>.

   a. Administrative Expenses Act of 1946, Section 1, 60 Stat. 806 as amended, codified at 5 U.S.C. 73b-1(a). In case of a transfer from one department to another, the gaining agency pays for the expenses of travel and transportation. *See*, B-144095, 1960 U.S. Comp. Gen. LEXIS 2304 (November 28, 1960).

   b. 5 U.S.C. 5722 (new employees) & 5724 (current employees), see 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967).

      (1) These two statutes divided moves between overseas travel for new employees and overseas travel for current employees, and then treated both groups the same. In both cases, going overseas the gaining agency could pay for "[t] ravel expenses of a new

appointee and transportation expenses of his immediate family and his household goods and personal effects from the place of actual residence at the time of appointment to the place of employment outside the continental United States," which meant that per diem was available for the employee but not for the family member travel. 5 U.S.C. 5722(a)(1) (circa 1967). (For current employees, "travel and transportation to and from the post shall be allowed to the same extent and with the same limitations prescribed for a new appointee under section 5722." 5 U.S.C. 5724(d) (circa 1967).)

(2) Upon return, the allowances were the same, e.g., no per diem for the family. 5 U.S.C. 5722(a)(2), 5724(d) (circa 1967). Also, the return was to the actual place of residence, not the next permanent duty station. 5 U.S.C. 5722(a)(2) (circa 1967).

(3) The statute repeated the Administrative Expenses Act of 1946 that the gaining command paid when "an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by this section." 5 U.S.C. 5724(e) (circa 1967). Gaining agencies could evade this requirement by having the employee return for separation (which forced the losing activity to pay for the OCONUS-CONUS move, and then picking the employee up the next day without a break in service). *See*, 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967).

2. GAO Decisions - 1960s Era.

a. Basic Rule for Funding Moves - Gaining Command Pays. The basic rule, and the default rule if none other applies, is that the gaining organization funds the PCS move. 44 Comp. Gen. 767 (June 2, 1965) (second situation), *citing* B-144095, 1960 U.S. Comp. Gen. LEXIS 2304 (November 28, 1960). But as interpreted, this rule only applied if there was no break in service.

b. Specific Rule - FOCONUS to CONUS, Losing Command Pays To Actual Residence. The rule for return from FOCONUS is different where the employee has completed a tour under a TA, i.e., the employee has earned an entitlement to return transportation to his place of actual residence between overseas tours, then the expenses for the move are properly payable by the department in which he earned the TA. By completion of a period of service overseas with the old agency the employee is entitled to be returned to the United States for separation at the expense of that agency. 44 Comp. Gen.

767 (June 2, 1965) (first situation). The GAO specifically held that 5 U.S.C. 5724(e) (circa 1967) (which provides that when an employee transfers from one agency to another, the gaining agency pays the authorized expenses) is not violated when the employee returns from OCONUS for separation paid for by the losing agency, and is picked up the next day without a break in service. 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967).

(1) **Different Result if Employee Moves to Different Agency**: If Employee is Employed by Gaining Agency Prior to Return From OCONUS then Gaining Command Pays. "There is no doubt that if the employee is employed by the new (acquiring) agency prior t [sic, to] his return travel to the United States the provisions of 5 U.S.C. 5724(e) would preclude the old [losing] agency from paying any part of such travel and transportation expenses. We ... know of no legal basis upon which any part of the return travel expenses can be paid by the old [losing] agency." 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967). Note that section 5724(e) applies to moves between agencies, not to moves within a DOD agency.

(2) **Problem**: There Must Be No Break in Service For Follow-on Move to New PDS. If a break in service occurs between the separation from the old (losing) agency and the transfer to the new (gaining) agency then neither agency can pay the employee's expenses from the actual place of residence in the United States to the duty station in the United States with the gaining agency, unless the employee can qualify for entitlement to such expenses under some special authority, such as that contained in 5 U.S.C. 5723. 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967).

(3) **Problem**: No Per Diem for Family Members While on Travel From Overseas to Actual Residence. 47 Comp. Gen. 763, B-160565, 1968 U.S. Comp. Gen. LEXIS 137 (June 21, 1968); B-163113, 1968 U.S. Comp. Gen. LEXIS 2419 (June 27, 1968) (Question 2, since return travel to the United States was performed incident to separation orders, per diem for the family was not properly paid and should be recovered.). The Comptroller General confirmed this position in B-163113, 1968 U.S. Comp. Gen. LEXIS 202 (September 19, 1968), explaining that by statute, 5 U.S.C. 5724, employees returning from OCONUS to CONUS for separation (even where there is no break in service for a follow-on job) are entitled to per diem but not the family members. Section 5724 provides that an employee

on return from overseas gets the same travel and transportation expenses as a new employee in 5722 which provides that new employees get per diem but not family members. B-163113, 1968 U.S. Comp. Gen. LEXIS 202 (September 19, 1968). On the other hand, where the employee is moving not for separation but for a transfer between official stations, then per diem is allowed. B-163113, 1968 U.S. Comp. Gen. LEXIS 202 (September 19, 1968), *citing* 5 U.S.C. 5724a (which only allows per diem for family members when the transfer is "between the employee's old and new official stations.").

(a) Note: As long as there was no break in service upon return from overseas, per diem for family member travel was allowed for travel from the United States actual residence to the new CONUS PDS. 47 Comp. Gen. 763, B-160565, 1968 U.S. Comp. Gen. LEXIS 137 (June 21, 1968).

(4) 1960s Era Rules Regarding Follow-on Move to New (Gaining) PDS.

(a) That one activity paid for the return travel expenses from OCONUS to the actual residence for separation where there was no break in service, did not bar the gaining activity from paying subsistence expenses for occupation of temporary quarters in the United States. B-163113, 1968 U.S. Comp. Gen. LEXIS 2419 (June 27, 1968) (Issue 1, decision under Bureau of the Budget Circular No. A-56).

(b) Limit on Funding Follow-on Move to New (Gaining) PDS. Where the employee is entitled to be returned from OCONUS to his actual residence, returns for separation to be hired to a new United States PDS and there is no break in service, the maximum allowable costs are **direct travel from the "old to the new duty station," i.e., from the losing OCONUS duty station to the gaining United States duty station.** 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967); B- 163364, 1968 U.S. Comp. Gen. LEXIS 2420 (June 27, 1968).

(c) Effect of TDY/TAD En Route. Where the employee was returning from Bangkok, Thailand, to is actual residence in Somerville, Massachusetts, for separation, and had been rehired without a break in service for a position at St Croix in the Virgin Islands and the gaining activity wanted him to visit various duty stations on the East Coast before going to the

Virgin Islands, then reimbursement for travel from Massachusetts to the Virgin Islands "may not exceed the cost of direct travel from Bangkok to St. Croix via the various temporary duty stations less the amount paid by [the losing OCONUS agency] for [the employee's] travel from Bangkok to Somerville." B-163364, 1968 U.S. Comp. Gen. LEXIS 2420 (June 27, 1968).

(d) Household Goods Move. The OCONUS losing activity funding is limited to the cost direct movement of the HHG from the OCONUS losing activity to the United States gaining activity PDS, in the particular case, from Bangkok to St. Croix Island in the Virgin Islands. B-163364, 1968 U.S. Comp. Gen. LEXIS 2420 (June 27, 1968).

(e) Subsistence Expenses, MEA, and Per Diem From Residence to New Duty Station. Where there was no break in service in returning from overseas for resignation, the gaining agency may authorize reimbursement to the employee for subsistence expenses while occupying temporary quarters. Also, the miscellaneous expenses allowance would be payable, and per diem for the family would be allowable for travel from the actual residence to the new duty station, not to exceed in any event per diem for travel time direct from old to the new duty station. 47 Comp. Gen. 763, B-160565, 1968 U.S. Comp. Gen. LEXIS 137 (June 21, 1968), *further developing* 46 Comp. Gen. 628 (January 24, 1967). GAO specifically ruled that the fact that the OCONUS losing command had paid for the employee's return travel expenses pursuant to a TA, the gaining agency was not barred from paying subsistence expenses while in temporary quarters nor barred from paying the miscellaneous expense allowance. B-163113, 1968 U.S. Comp. Gen. LEXIS 2419 (June 27, 1968) (Question 3, second part, decision under Bureau of the Budget Circular No. A-56). Per diem for family members from actual residence to new PDS, miscellaneous expense allowance and subsistence expenses while occupying temporary quarters payable in accordance with 5 U.S.C. 5724a and Bureau of the Budget Circular No. A-56. B-163364, 1968 U.S. Comp. Gen. LEXIS 2420 (June 27, 1968).

(f) Family Member Per Diem Distinction. In this decision the GAO held that when the member returned for separation and then transferred to the next activity without a break in service per diem WAS NOT available for the family members from

OCONUS to actual residence but per diem WAS payable going from the actual residence to the new PDS. 47 Comp. Gen. 763, B-160565, 1968 U.S. Comp. Gen. LEXIS 137 (June 21, 1968).

(5) 1960s Era Rules Applied in Practice - Where Gaining Command is Closer Than Actual Residence. Of course, in practice, and with GAO's blessing, where the gaining command was closer than the actual residence, the losing FOCONUS activity ended up funding the move directly to the CONUS gaining activity. 44 Com Gen 767 (June 2, 1965) (first situation); 46 Comp. Gen. 628, 1967 U.S. Comp. Gen. LEXIS 157 (January 24, 1967) (It would be proper for the losing agency to pay the expenses incurred in traveling to the place of actual residence or some other selected point in the United States but not to exceed the constructive cost of travel to the place of actual residence.).

(a) In this case the Navy employee was stationed at Guantanamo Bay, Cuba, with an actual residence in Tacoma, Washington, and "returned for separation" to Huntsville, Alabama, to begin work with another agency without a break in service. 44 Comp Gen 767 (June 2, 1965) (first situation).

(b) Employee was entitled to travel expenses from FOCONUS to Tacoma because he finished an overseas tour and assuming he was not yet hired by the new agency - but the employee was limited to travel expenses to Huntsville because his actual travel expenses are limited to the cost of travel to Huntsville. Costs were payable by the losing agency. 44 Com Gen 767 (June 2, 1965) (first situation).

(c) For the family members, who actually traveled from Cuba to Tacoma, the employee was entitled to transportation of his immediate family, paid for by the losing activity, from FOCONUS to Tacoma because he finished an overseas tour and (assuming he was not yet hired by the new agency) since they, in fact, traveled to Tacoma incident to his separation. But, the employee would not be entitled to transportation of his family from Tacoma to Huntsville. That travel would be regarded as being incident to his placing his family at his first duty station with the new agency in Huntsville. (Presumably, the family's transportation could have been funded by the losing command if they had gone direct from Cuba to Huntsville since Huntsville is closer to Cuba than

Tacoma.) 44 Comp Gen 767 (June 2, 1965) (first situation).

(6) 1960s Era OVERSEAS to Actual Residence Where Actual Residence is Beyond New Duty Station. Where the employee and his family have traveled under separation orders to the actual residence, which was further from the losing overseas duty station than the new gaining PDS, without a break in service, then:

- All costs to the place of actual residence are payable by the overseas losing agency.

- No costs of travel or transportation are allowable from the actual residence to the new gaining PDS duty station; however, no collection is required for costs paid to the actual residence which are in excess of costs which would have been incurred for direct travel from the overseas station to the new PDS. *Citing see* 44 Comp. Gen. 767.

- It is permissible for the acquiring agency to pay MEA and subsistence while the employee was occupying temporary quarters

- No per diem allowance for travel time of the family was allowed.

- If transportation of the employee's household effects has been delayed until after the transfer, the losing agency would pay the costs of such transportation not to exceed the cost of returning such goods to the employee's residence and the gaining agency would pay the balance of such costs up to the cost of direct transportation from old to new station.

47 Comp. Gen. 763, B-160565, 1968 U.S. Comp. Gen. LEXIS 137 (June 21, 1968).

c. 1960s Era FOCONUS to FOCONUS WITHOUT Home Leave - Gaining Command Pays. The basic rule applies and the gaining command pays for the cost of the PCS move. B-144095, 1960 U.S. Comp. Gen. LEXIS 2304 (November 28, 1960), *citing* P.L. 600 § I.A, 60 Stat. 806; 44 Com Gen 767 (June 2, 1965) (second situation).

d. 1960s Era FOCONUS to FOCONUS WITH Home Leave – Cost is Split. This is where the OCONUS employee is changing agencies at the end of the first overseas tour and will be taking home leave

between the end of the first overseas tour and the start of the second overseas tour. GAO's decision was that while the law is silent as to which agency must bear the expense of home leave travel and transportation under such circumstances, the law permits the expenses to be divided, that is, the losing agency bears the expense of travel of the employee and transportation of the employee's family to the actual place of residence in the United States, and that the gaining agency to which the employee transfers after completion of a period of home leave will pay such expenses from the actual place of residence in the United States to the new overseas duty station. GAO's rationale was that in a home leave situation, payment of the expenses of travel from the home leave point to the same overseas post or a different overseas post results solely from the agreement to serve an additional tour of duty overseas. Thus, where the employee has signed a renewal agreement for overseas duty with a different gaining government agency, the losing agency is not receiving any benefit from assuming the employee's travel expenses back to an overseas post. 44 Com Gen 767 (June 2, 1965) (second situation).

(1) The gaining agency pays the expenses of direct shipment of the household effects of the employee from his old overseas station to his new overseas station. 44 Com Gen 767 (June 2, 1965) (second situation).

I. **<u>Potential for Funding Two Moves in RIF & TOF Situations</u>**. This part of the outline discusses the limited option of funding and additional move for an employee from overseas - the only time funding multiple moves is an option occurs when a RIF or transfer of function (TOF) is involved where the OCONUS employee is separated from federal service, returns to the actual residence or the equivalent, and is re-hired into a "nontemporary" position within a year of separation from federal service. Due to the few GAO decisions on point, the outline also includes decisions involving CONUS-to-CONUS moves.

1. <u>Statutory & Regulatory Structure</u>. The two primary statutory provisions are 5 U.S.C. 5724(e), which covers the transfer of an employee from one agency to another where a RIF or a TOF is involved, and 5 U.S.C. 5724a(g) which covers the funding of moves by former employees who transfer to a different geographic location (and which does not distinguish between moves to the same or different agency). An employee who loses their position by RIF or TOF and gains a new position with the same DOD agency, without a break in service, is covered by the JTR.

a. **5 U.S.C. 5724(e)**: covers the transfer of a current employee from one

agency to another agency where a RIF or TOF is involved. The move may be funded (or not) by either the losing or gaining agency as agreed by the heads of agency. This provision is supplemented by the JTR which provides that if the non-DOD agency refuses to join in the costs, the DOD agency will pay. JTR C1052-B. A move for example from the Navy to the Army is covered by this statute. *See* JTR C1052-B Note.

b. **JTR C1052-C**: covers the transfer of a current employee affected by a RIF, TOF or BRAC within a DOD agency, e.g., between two Navy stations. JTR C1052-B Note.

c. **5 U.S.C. 5724a(g)**: covers the move made within a year by a former employee separated by a RIF or a TOF transferred to a different geographic location for a nontemporary appointment. The statute does not distinguish between moves in the same agency or to a different agency, but having qualified under the statute to be eligible to be moved by the government, the move and funding of the move would depend on whether the employee is transferring between agencies (i.e., 5724(e) applies) or within a DOD agency (JTR C1052-C applies).

Warning: Advising an OCONUS employee who is being removed by RIF or TOF on what additional move will be paid for at the outset is immediately hazardous because the losing PDS will not know if the employee is going to be rehired by the same agency or rehired by another agency.

2. Transfer of a Current Employee From One Agency to Another Where a RIF or TOF is Involved. 5 U.S.C. 5724(e); JTR C1052-B. The ordinary rule for transfers between agencies is that the gaining agency pays. 5 U.S.C. 5724(e); JTR C1052-B.1. But in a transfer from one agency to another because of a RIF or TOF, authorized expenses "may be paid in whole or in part by the agency from which the employee transfers or by the agency to which he transfers, as may be agreed on by the heads of the agencies concerned." 5 U.SC. 5724(e). As implemented by the JTR, "Necessary costs for a transfer, between different DoD activities, of an employee identified for separation/demotion caused by RIF/transfer of function must be paid by the losing activity. A losing DoD activity must endeavor to have a non-DoD gaining activity pay or share the necessary costs incident to transfers (that involve a RIF/transfer of function) to a department/agency outside DoD. If a non-DoD gaining activity refuses to assume or share the expense, the cost must be paid by the losing activity." JTR C1052-B.2.

a. The JTR specifically emphasizes that the rule for moves between agencies applies to movements between any of the following: Army, Navy, Air Force, Marine Corps, DoD Components, to or from non-DoD agencies. JTR C1052-B. Note.

b. GAO Decisions Where Agencies Disagree On Which Should Fund.

(1) *Patricia C. Reed*, B-184653, 55 Comp. Gen. 1338 (Aug. 3, 1976,). The approach that either a losing or gaining activity may fund relocation costs carries its own risks. Mrs. Reed was riffed from the Selective Service System. She found a position with the Navy in a different geographic location within a year of her separation from Federal Service, at which time she requested that her previous agency fund her relocation expenses. The Selective Service advised that it never paid relocation expenses. GAO acknowledged that the Selective Service policy was appropriate to that agency, and suggested that Mrs. Reed submit her claim instead to the Navy.

(2) *Gordon W. Kennedy*, B-219971, 65 Comp. Gen. 332 (Feb. 21, 1986). The *Kennedy* decision is difficult to reconcile with the *Reed* decision. Kennedy was riffed from his job at the Department of Agriculture (DAG). Within a year, he was hired in a different geographic location by the Defense Logistics Agency (DLA). GAO noted that both the gaining and the losing agency have the discretion to pay all, some, or none of the individual's relocation expenses. DLA argued that the JTR set forth DoD's policy for the losing agency to pay these costs. GAO accepted DLA determination that, as the gaining agency, it could not properly pay the relocation expenses. GAO held that because DLA, as the gaining agency, declined to pay any expenses, DAG, as the losing agency, could make payment of a portion of the employee's relocation expenses without the need for an agreement between the heads of the two agencies involved.

(3) Analysis. What is perplexing is that GAO cited the *Reed* decision as authority for its decision in *Kennedy* even though the *Reed* decision concluded by recommending that the claimant submit her claim for payment to a gaining DoD (Navy) activity. Unfortunately, the *Kennedy* decision does not cite the language on which DLA based its assertion of the "underlying Department of Defense policy set forth in Volume 2 of the Joint Travel Regulations. Under this policy, the Department of Defense component may pay relocation expenses only when it is the losing agency." In fact, the current JTR C1052-B.2 and C1052-

> C.2 imposes that policy only when the transfer is between two DoD activities. In other cases involving a non-DoD gaining activity, the DoD losing activity only pays the relocation cost after it has failed to negotiate an arrangement for the gaining non-DoD activity to pay all or some of the relocation costs.

3. Transfer of a Current Employee Within the Same DOD Agency Where a RIF or TOF is Involved. JTR C1052-C. The ordinary CONUS rule for transfers within the same DOD component is that the gaining activity pays. JTR C1052-C.1. The JTR then states two applicable exceptions to the general rule (the third exception deals with post-BRAC moves). Moves involving:

   - RIF/TOF, "The losing activity **must pay** necessary movement costs." JTR C1052-C.2 (emphasis added).

   - Moves from an OCONUS Activity to a CONUS Activity including RIF, TOF or PPP move. C1052-C.4 (discussed further below).

   This JTR sections also affirms that moves from an OCONUS activity to an activity of the same DoD component in Hawai'i is treated the same as the other moves. JTR C1052-C.5, *referencing* C1052-C2 (RIF, TOF), C1052-C3 (BRAC) & C1052-C4 (OCONUS to CONUS) (why Hawai'i is specifically mentioned when other non-foreign OCONUS locations are not mentioned is not stated).

   a. JTR Provision for Return From OCONUS Involving a RIF, TOF or PPP Move.

      > "From an OCONUS Activity to a CONUS Activity. When an employee transfers from an OCONUS activity to a CONUS activity, the losing OCONUS activity must pay for the costs of transportation for the employee and dependents, including per diem and transportation of the employee's HHG/POV to the employee's actual residence or to the CONUS activity up to the cost for such transportation to the employee's actual residence. If the gaining activity authorizes PCS allowances it is responsible for the cost of necessary additional transportation for the employee and dependents, including per diem and transportation of the employee's HHG/POV to the new PDS, the miscellaneous expense allowance, real estate allowances (if the employee is eligible), and at its discretion for a house hunting trip (if the employee is eligible) and TQSE for an:
      >
      > ....

> "d. Employee with/without transportation agreements moved under the PPP. (If a RIF/transfer of function is involved, par. C1052-C2 above applies [which states "The losing activity must pay necessary movement costs."])
>
> JTR C1052-C.4 (parenthetical comments in original).

b. Possible Interpretations. It is not clear how these provisions are to be applied when two of the conditions apply, e.g., a RIF from an OCONUS activity. Does the RIF rule trump the OCONUS rule (or vice versa), or are they to be read together somehow? As will be discussed below, even the internal reference for a return from OCONUS involving a RIF is unclear.

(1) Where the employee is moving under the PPP program and no RIF or TOF is involved, then the OCONUS losing activity funds the transfer to the actual residence or equivalent and the gaining CONUS activity can pay the balance of the transportation costs and allowances if it has authorized payment of the PCS. In this circumstance it doesn't matter whether the employee had a transportation agreement (TA) or not. This would be the same as the standard rule for funding overseas moves.

(2) Where the employee is moving from OCONUS under the PPP because of a RIF or TOF, then the first sentence of C1052-C.4 requires the OCONUS activity to fund the move from OCONUS to the employee's actual residence or equivalent. The parenthetical comment in subparagraph d. referencing C1052-C.2, to the effect that if a RIF/TOF is involved the "losing activity must pay necessary movement costs," seems to say that the losing OCONUS activity is also responsible for funding the balance of the costs and allowances for the move (from the actual residence, although actually from the losing OCONUS PDS) to the new gaining activity's PDS.

(3) Where the employee is moving from OCONUS, because of a RIF or TOF, to CONUS, and the PPP is NOT involved (e.g., a riffed OCONUS attorney looking for a CONUS attorney position), its not clear if the RIF/TOF rule applies because a RIF is involved which means the OCONUS activity pays for the entire move, or, because no PPP is involved that the "normal" rule applies the OCONUS activity is responsible for funding the move to the actual residence or equivalent and, if the gaining CONUS activity authorizes PCS expenses, then the gaining activity is responsible for funding the remainder of the move.

4. Transfer Within a Year of a Former Employee Separated by RIF or TOF to a Different Geographic Location for a Nontemporary Appointment. 5 U.S.C. 5724a(g) (previously codified at 5724a(c).)

   a. Summary. Where the employee was separated by reason of RIF or TOF, the government can fund the move in the same manner as though the employee had been transferred in the interest of the Government, without a break in service, to the location of reemployment from the location where separated, when within one year after the separation the employee is reemployed in a nontemporary appointment at a different geographical location from that where the separation occurred. In the context of a OCONUS RIF or TOF, the losing activity would have moved the separating employee to their actual residence (U.S. home of record) or an alternate destination funded up to the cost of moving the employee to the employee's actual residence, the employee would have then left government service for less than a year, found a new job, and needs to be moved to the new PDS. Note, the statute does not mandate the agencies fund the move, only that the employee "may be allowed and paid the expenses" authorized for a move. 5 U.S.C. 5724a(g).

   b. So Which Activity Funds the Move? Application of the Rule. Section 5724a(g) says that former employee's transfer should be treated the same as if there had been no break in service. It would then follow that if the employee is transferring from one agency to another then the section 5524(e), JTR C1052-B. apply, and if the employee ends up transferring within the same DOD agency, then the rules of JTR C1052-C apply. *See* B-172594, 53 Comp. Gen. 99 (Aug. 14, 1973) (discussed below).

   c. All Of The Requirements Under The Statute Need To Be Met.

      (1) Section 5724a(g) only applies when it involves:

      - A former employee
      - Separated by reason of RIF or TOF
      - Who within one year after the separation
      - Is reemployed by a nontemporary appointment
      - At a different geographical location from that where the separation occurred.

(2) Cases Where the Criteria Were Not Met.

(a) *Robert Garcia*, B-195374, Sep. 14, 1979. This decision highlights the limits GAO will impose if it finds that the basic requirements of the statutes are not met. Garcia was riffed and went on PPP. Inadvertently, the agency deleted Garcia from the PPP for a period of time. He was eventually rehired but beyond the 12 month period. GAO acknowledged that the agency's mistake was probably the direct cause for the failure to be rehired within the year period. Despite that, GAO held there was no statutory basis for funding relocation costs to a new duty station.

(b) *Jan Evans*, B-209026, Feb. 9, 1983. This case is another example of GAO's approach to narrowly construing the requirements in 5 U.S.C. 5724a(c) now 5724a(g). The employee lost her job through a RIF in San Francisco. She returned to her home in Washington State. An agency incorrectly advised her that she was eligible for a permanent position and she moved back to San Francisco. GAO held that her relocation expenses could not be paid because she was not rehired into a permanent job. Moreover, the job was in the same geographic location as her original one. This case also highlights GAO's refusal to allow incorrect agency advice to prevail over statutory or regulatory requirements.

d. What Allowances Are Authorized For The Former Employee?
Section 5724a(g) provides the former employee my be allowed and paid the expenses authorized by sections 5 U.S.C.

- 5724 [travel & transport expenses for employees],
- 5725 [travel & transport & dangerous areas],
- 5726(b) [storage of household goods], and
- 5727 [transport of motor vehicles],
- And may receive the benefits authorized by 5 U.S.C. 5724 (a) - (f)
- 5724(a) [travel expenses for employee, transport of family members, and HHG up to 18,000 pounds]

- 5724(b) [CONUS move & house trailer or mobile home]

- 5724(c) [CONUS simplified move]

- 5724(d) [When an employee transfers OCONUS expenses of travel and transportation to and from the post shall be the same as for a new appointee under section 5722]

- 5724(e) [When an employee transfers from one agency to another, the gaining agency pays the expenses in 5724 and 5724a(a)-(f), except for a RIF or TOF (other than for a transfer to a foreign country) may be paid in whole or in part by the losing or gaining agency, as may be agreed to by the heads of the agencies concerned)

- 5724(f) [Advances of funds]

5. WARNING - Possible Funding Limits on How Much of the Subsequent Move Can Be Funded. How much of the second move, from the ex-employee's "actual residence" to the new PDS, can be funded is uncertain. Normally, the maximum allowed funding is the cost of a direct move from the losing OCONUS PDS to the gaining CONUS PDS. Here though, the employee will have gone from the losing OCONUS PDS to the "actual residence" where the employment with the losing PDS ended, and then, within a year gotten a permanent position with another CONUS activity. What happens if the cost of the second move, combined with the incurred cost of the first move, costs more than a direct move from the OCONUS PDS to the new CONUS PDS? The employee could be held liable for that amount. There is a decision holding the gaining agency can pay this amount but it is over 40 years old and has been partially over-ruled on another point. The employee was separated by an OCONUS RIF, returned to his CONUS actual residence and seven days later, was hired by another DOD activity over 400 miles away. GAO said the gaining command could fund the relocation costs, less costs incurred by the losing agency to return the individual to a CONUS residence, which if in excess of the cost of direct travel between the stations, need not be recouped by the losing agency. *Roscoe Cleveland*, B-172594, 51 Comp. Gen. 14 (July 7, 1971), *later overruled on other grounds by* B-172594, Aug. 14, 1973, 53 Comp. Gen. 99 (1973).

6. This is An Exception to Restrictions in the PPP Manual. The PPP normally does not authorize funding relocation costs after separation from Federal service.

Displaced overseas employees, without return rights to their current

grade or a higher grade, who return to the U.S. after separation without a placement offer will have overseas activities deleted from their area of referral. Registration will continue for 12 months after the date of separation for locations in the U.S. and Puerto Rico. When such a break in service occurs, no travel or transportation expense is allowed from the place of actual residence or authorized alternate separation travel destination to the new duty station.

DOD PPP Operations Manual, Chap 5, ¶ 6c. Section 5724a(g) provides a statutory exception to this administrative rule.

7. GAO Decisions.

a. Two issues must be considered or evaluated when reading the GAO decisions on agency responsibility for funding relocation costs.

(1) GAO decisions frequently cite statutes as the determining factor for allowances. When dealing with RIF's, GAO cites 5 U.S.C. 5724(e) (addressing what happens when an employee transfers from one agency to another), and 5 U.S.C. 5724a(c) (addressing what happens in cases involving RIF/TOFs). It is important to note, however, that beginning with the 1997 version of the U.S. Code, the language formerly found in 5 U.S.C. 5724a(c) was relocated and is now found in 5 U.S.C. 5724a(g). Accordingly, where the personnel actions took place before 1997, cases citing 5 U.S.C. 5724a(c) only make sense if they are understood as referencing "5724a(g)" instead. Indeed, no recent decisions were found citing 5 U.S.C. 5724a(g).

(2) When reading the cases, look at how GAO treats the relationship between 5 U.S.C. 5724(e) and "5 U.S.C. 5724a(c)" (i.e., 5 U.S.C. 5724a(g) (2004). In some cases, GAO reads them together and in other cases it treats section 5724(e) as a general authority for transfers between agencies but then cites section 5724a(c) as the specific authority for a transfer involving a RIF, which overrides section 5724(e). This makes for some inconsistent analysis in the decisions although the results are generally in agreement.

b. GAO Decisions.

(1) **OCONUS RIF Case** - *Roscoe Cleveland*, B-172594, 1971, 51 Comp. Gen. 14 (July 7, 1971), *later overruled by* B-172594, 53 Comp. Gen. 99 (Aug. 14, 1973).

(a) A DoD employee subject to an OCONUS RIF separated

from service and was returned to his actual residence in California. After a 7-day break in service, the former employee accepted a position with another DoD activity located 419 miles from his residence. GAO noted that, under the general rule in 5 U.S.C. 5724(e), as implemented by the then current version of the JTR, the DoD command issuing the RIF was required to fund the entire transfer. But GAO noted that 5 U.S.C. 5724(e) assumed that no break in service had occurred. Because of the break in service in this case, GAO held that it fell within the purview of 5 U.S.C. 5724a(c) and not 5 U.S.C. 5724(e). Under section 5724a(c), governing the reimbursement of employees involved in a RIF but who are rehired within 1 year of separation, the acquiring agency bears the expenses of the employee's travel between the old and new stations. Because the then current version of the JTR didn't specifically address this situation, GAO allowed costs to be split between the losing and gaining commands. The decision said the gaining command should fund the relocation costs, less costs incurred by the losing agency to return the individual to a CONUS residence, which if in excess of the cost of direct travel between the stations, need not be recouped by the losing agency.

(b) The subsequent overruling decision revised the rules and provided more flexibility as to which command could fund the transfer. B-172594, Aug. 14, 1973, 53 Comp. Gen. 99 (1973). What is important to realize is that GAO accepted in both decisions, without question, the fact that an employee could separate from service, be returned to a home of record, and if appropriately re-hired, could be reimbursed for relocation costs to the new duty station, within the limitation mentioned above. Recall again this limitation applies if the employee is rehired by another DoD activity.

(2) **CONUS RIF Case** - B-172594, 52 Comp. Gen. 345 (Dec. 14, 1972), *later overruled by* B-172594, 53 Comp. Gen. 99 (Aug. 14, 1973). This decision involved a riffed DoD employee who had a break in service for less than one year and then was rehired in a different DoD Component. Again GAO was asked to determine which activity paid for the relocation to the new duty station. GAO noted that its decision in 51 Comp. Gen. 14, involved riffed employees returning form overseas. This case involved a separation from service and reemployment both in the United States. GAO ruled that without a break in service, the statute and

then current version of the JTR did not envision or allow a losing command to fund the relocations costs authorized by 5 U.S.C. 5724a(c) (i.e., the second transfer from the home of record to the new duty station upon reemployment).

(3) **Key Decision** - B-172594, Aug. 14, 1973, 53 Comp. Gen. 99 (1973).

(a) In response to the Assistant Secretary of the Navy's request to reconsider the previous decision in 52 Comp. 345, GAO decided that its earlier decisions were too restrictive. Focusing on 5 U.S.C. 5724a(c) language that a former employee who is appropriately rehired is authorized transfer costs "in the same manner" as though the employee transferred without a break is service and construing 5 U.S.C. 5724(e) to provide similar authority for transfers between agencies, GAO interrelated the statutes as permitting payment of transfer costs in whole or in part by either the gaining or losing activity. Regardless whether analysis would lead to determining that benefits were based on 5 U.S.C. 5724(e) or 5 U.S.C. 5724a(c), they could be paid by the gaining or losing command.

(b) This case remains the key decision concerning funding for transfers involving RIFs and it authorizes payment for all RIF situations "whether the reduction in force involves a direct transfer or a separation and rehiring by a different agency with the 1-year period." A careful reading indicates the current JTR continues to follow the decision as reflected in the policy that rehiring outside DoD requires the losing activity to "endeavor" to share costs with the gaining agency and authorizes complete payment if no agreement cannot be reached. The JTR now has regulatory policy for RIFs and rehiring within the same DoD component or different DoD components, something the GAO directly commented on in overruling its earlier decisions. This decision also represents a limit to which GAO will liberally interpret the statutes.

XXV. PERSONAL SERVICES CONTRACTS.

A. General Prohibition. Personal services contracting begins with the Federal Acquisition Regulation (FAR) which states, "Agencies shall not award personal services contracts unless specifically authorized by statute ... to do so." FAR 37.104(b).

Warning: Any contract can devolve into a personal services contract if government employees begin to direct contractor employees on how to perform their work.

B. The Employer-Employee Relationship Created Through Personal Services Contracts.

1. Personal services contracts are "characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." FAR 37.104(a). The government normally hires via civil service laws. Obtaining personal services by contract, rather than by direct hire, improperly circumvents those civil service laws "unless Congress has specifically authorized acquisition of the services by contract." FAR 37.104(a).

2. Attributes of what constitutes personal services contracts are described at FAR 37.104(c) and (d), "the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract." FAR 37.104(c)(2).

3. The implementing DOD instruction for personal services contracts with health care providers relates:

   a. A personal services contract is a "contract that, by it express terms or as administered, makes the contractor personnel appear, in effect, to be government employees." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶C.1 (ASD(HA) Feb 27, 1985);

   b. "DoD supervisors may direct the activities of personal services contractors on the same basis as DoD employees." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶D.4 (ASD(HA) Feb 27, 1985); and,

   c. That personal injury claims arising alleging negligence from within the scope the contractor's performance "will be processed as claims alleging negligence by DoD military or civil personnel." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶E.2 (ASD(HA) Feb 27, 1985).

4. Overseas Variations. Overseas, the contractor/employment status of personal services contractors will likely be determined by host nation courts using host nation legal criteria. Thus, it is possible that while

under American law the personal service contract constitutes an employer-employee relationship, that under local standards a host nation court may find the relationship is principal/independent contractor. This will affect disputes in both the "employment" arena and allegations of negligence.

C. <u>Elements of a Personal Services Contract</u>. The FAR has incorporated the "Pellerzi Standards" (so-called after the Civil Service Commission General Counsel who drafted them in 1967), which are supposed to determine whether an employer-employee relationship exists.

1. FAR 37.104(d) states, "The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

   a. Performance on site.

   b. Principal tools and equipment furnished by the Government.

   c. Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

   d. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

   e. The need for the type of service provided can reasonably be expected to last beyond 1 year.

   f. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to-

      (1) Adequately protect the Government's interest;

      (2) Retain control of the function involved; or

      (3) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee."

2. The FAR does not mention how these factors are to be considered or weighed.

3. Remember, "the key question" is determining whether a personal services contract exists "always being: Will the Government exercise relatively

continuous supervision and control over the contractor personnel performing the contract." FAR 37.104(c)(2).

a. Older GAO decisions considered not just the issue of "continuous supervision" but the amount of supervision in proportion to the type of supervision normally required for the tasks being performed. *T.C. Associates*, B-193035, Apr. 12, 1979, 1979 U.S. Com. Gen. LEXIS 2682.

b. More recent GAO decisions have tended to limit their inquiry to the question of supervision and control as stated in FAR 37.104(c)(2). Each case must be "judged in the light of its particular circumstances, with the key question being whether the government will exercise relatively continuous supervision and control over the contractor personnel performing the contract." *Information Ventures, Inc.*, B-290785, Aug. 26, 2002, 2002 CPD ¶ 152, *citing* FAR § 37.104(c)(2); *Carr's Wild Horse Ctr*., B-285833, Oct. 3, 2000, 2000 CPD P 210 at 7.

D. <u>Personal Services Contracts for Temporary or Intermittent Employment of Experts & Consultants</u>. The general section on employment authority, (U.S. Code Title V, Chapter 31, Subchapter 1), has a provision for the temporary (not in excess of 1 year) or intermittent employment of experts and consultants. 5 U.S.C. 3109. The Office of Personnel Management (OPM) criteria for hiring Experts and Consultants is at 5 C.F.R. part 304. The forthcoming implementation of the National Security Personnel System (NSPS) is expected to expand this authority.

1. <u>Limits on Pay for Experts and Consultants</u>. Section 3109(b) ostensibly limits pay rates to that of GS-15 step 10, and the implementing OPM regulation provides that unless otherwise authorized by statute, the maximum pay is the daily or bi-weekly rate for a GS-15 step10 excluding locality pay or any other additional pay. 5 C.F.R. 304.105. But the key language is the "unless otherwise authorized." Determining the actual pay limit for experts and consultants is complicated by a number of public laws and Comptroller General decisions which are not summarized here.

2. Agencies are required to report the number of days the agency employed each expert or consultant and the total amount paid them. 5 U.S.C. 3109(e); 5 C.F.R. 304.107.

E. <u>Personal Services Contracts for Heath Care</u>. There is a separate statute

for personal services contracts for health care. The Secretary of Defense may enter into personal services contracts to carry out the "health care responsibilities" of the Secretary. 10 U.S.C. 1091(a).

1. Types of Health Care Services.

   a. Health Care Providers. The statutory language is broad enough to include personal services contracts for hiring health care administrators but the implementing DOD instruction is specifically limited to "[h]ealth services personnel who participate in clinical patient care and services" and specifically excludes personal services contracts where the "duties are primarily administrative or clerical ... [or for] maintenance or security services." DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶C.2 (ASD(HA) Feb 27, 1985).

   b. Personal Services Contracts for Clinical Counseling, Family Advocacy Program Staff, & Victim's Services Representatives. In 1994 Congress authorized personal services contracts for these types of care providers to be executed under the provisions of 10 U.S.C. 1091. 10 U.S.C.A. 1091 note; Pub.L. 103-337, Div A. Title VII, § 704(c), Oct 5, 1994, 108 Stat. 2799.

2. Credentialing & Licensing. Contractors are subject to the same quality assurance, credentialing processes and other standards as are required for military health care providers. Providers, not including para-professionals, must be licensed in accordance with state or host country requirements. DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶D.3 (ASD(HA) Feb 27, 1985).

3. Location. Originally, personal services contracts for health care providers was limited by statute to health care facilities but the statute was changed in 1997 to allow contracts "at locations outside medical treatment facilities" such as recruiting stations. 10 U.S.C. 1091(a)(2); Pub.L. 105-85, Div A, Title VII, § 736(a), Nov 18, 1997, 111 Stat. 1814.

4. Limits on Pay. Although the statute limits contractor salary to that paid the President of the United States, the DOD instruction has a pay scale for para-professionals, nurses, physicians and dentists which remains linked to officer pay grades 0-3 to 0-6, with the proviso that the "0-6 grade shall be used sparingly and ... subject to review." 10 U.S.C. 1091(b), *referencing* 3 U.S.C. 102 (The President's annual income in 2004 was $400,000. 3 U.S.C. 102 (2004)); DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶D.5,

Encl. (1) (ASD(HA) Feb 27, 1985).

5. Procedures for Contracting.

   a. Competition for health care personal services contracts is not required when contracting with individual providers but competition is required when contracting "with entities other than individuals" (e.g., a professional corporation or partnership) or where the services will be provided outside of a medical treatment facility. 10 U.S.C. 1091 (a), (c)(2), (d).

   b. Contracts are to be awarded and administered according to the FAR and DFAR. DOD Inst 6025.5 "Personal Services Contracting Authority for Direct Health Care Providers" ¶E.4 (ASD(HA) Feb 27, 1985). A draft agreement is provided as enclosure (2) to the DOD instruction.

   c. In the Navy, responsibility for personal services contracts for health care falls under CNO who establishes guidance for approval/ disapproval. Delegated approval authority is to be at "the lowest command echelon possible which has the necessary expertise to properly perform such reviews." Activities wanting to contract for health care providers will forward the work statements through the chain of command to the appropriate approving authority. "No contract will be executed until approval has been obtained." SECNAVINST 4350.11 "Personal Services Contracting for Direct Health Care Providers" ¶ 4-5 (OP-933F2 Sept 17, 1986).

6. Reporting Requirements. There are extensive reporting requirements to Congress on use of personal services contracts and compensation paid to contractors. 10 U.S.C.A. 1091 note; Pub.L. 103-160, Div A. Title VII, § 721(b).

F. Personal Services Contractor Travel. Since personal services contracts establish an employee-employer relationship, it is no surprise that the JTR applies to their travel. JTR C1001-A.1, *citing see* 27 Comp. Gen 695 (1948)

XXVI. RESTRICTIONS ON OUT-SOURCING FIREFIGHTERS AND SECURITY GUARDS. 10 U.S.C. 2465.

A. Basic Restriction. Congress has generally limited the ability of DOD to outsource "the performance of firefighting or security guard functions at any military installation or facility" by prohibiting the obligation or expenditure

of any funds for that purpose. 10 U.S.C. 2465(a).

B. **Exceptions**. There are limited exceptions.

1. For installations outside the United States, DOD may enter into contracts for firefighting or security guard functions where "members of the armed forces would have to be used for the performance of a [firefighting or security-guard] function ... at the expense of unit readiness." 10 U.S.C. 2465(b)(1).

2. Where the contract for firefighting or security guard functions would "be carried out on a Government-owned but privately operated installation." 10 U.S.C. 2465(b)(2).

3. Where the contract for firefighting or security guard functions, "or the renewal of a contract" existed before September 24, 1983. 10 U.S.C. 2465(b)(3).

4. Several other exceptions have been created by regulation for installations being closed, contracts with nearby local or State governments, and for increased performance post-9/11. DOD Federal Acquisition Regulation Supplement, subpart 237.102-70.

C. **Legislative History**. This law was originally passed when Congress was interested in allowing "private industry to compete with the government sector wherever possible" with firefighters being an exception pending reports from DOD and the U.S. Fire Administrator. "Mandatory Contracting Out Provision" S. Rep. No. 331, 99th Cong., 2nd Sess. 1986, 1986 U.S.C.C.A.N. 6413, 1986 W.L. 31982 (Leg. Hist.). Nevertheless, the House of Representative's version "that would permanently prohibit the contracting out of security guard functions presently being performed by Department of Defense civilians" was adopted. "Contracting Out, Legislative Provisions Adopted (§ 1111-1112)" H.R . Conf Rep. 100-446 (Nov. 17, 1987), 100th Cong., 1st Sess. 1987, 1987 U.S.C.C.A.N. 1355, 1987 W.L. 61486 (Leg. Hist.).